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CURRENT EVENTS.

MARRIAGE LICENSES.—We learn from the Albany Law Journal that the New York "Legislature are taking a whack at the marriage laws. A bill has been introduced in the Assembly to compel the taking out of a license by parties proposing to be married. A license to enter into a civil contract! A license to form a partnership, for example! We shall have to reform all our theories of marriage before the necessity for a license can be made consistent with them. It has been suggested that it would be wise to make it penal for a divorced party, forbidden to remarry here, to marry out of the State and return here. But it is difficult to see what right our courts have to attach any such consequences to a marriage, legal where made, and not repugnant to morality. It is well enough, if not wise, to make stringent provisions against persons "solemnizing" (horrible word!) marriages of young minors where they know they are without the consent of parents or guardians; and so to allow an easy dissolution of marriage of girls under sixteen, without consent, and not consummated. But as between the two systems of easy marriage and hard divorce and hard marriage and easy divorce, we prefer the former."

We beg our readers to observe that the exclamation points in the foregoing sentences are those of the *Albany Law Journal*, not ours. We are not in the least astonished at the idea of subjecting the civil contract of marriage, like other civil contracts by which valuable and desirable privileges and franchises are obtained to the safe-guard and formality of a license. We are familiar with the marriage license system, living in a State in which all persons authorized by law to join people in marriage are forbidden, under prescribed penalties, to do so except upon the production of the statutory license duly issued by the proper officer to parties proposing to be married, who on their part have done all that the law requires of them, even to the delicate disclosure of the bride's age, the evidence of which is duly handed down to posterity in the records of the country.

Tne value of the marriage license law as a safe guard against improvident and illegal marriages has been tested in some of the States by the experience of over one hundred years. The law on that subject now in force in Tennessee, is in substance the same, with that which was enacted by North Carolina amid the throes of the Revolutionary war in 1778. It continued in force until the separation of Tennessee from North Carolina in 1796 and has ever since been the law of both States.

That the system is a good one and sufficiently answers the purpose for which it was devised, is abundantly manifest from the fact that there has never occurred any occasion to amend it in any material respect, and that there has never been in either State any abnormal development of immorality or matrimonial infelicity, or any which could in any sense be attributed to the marriage license law.—

Our contemporary implies that by requiring a marriage license to be applied for by parties and granted by the State, marriage is msde "hard," and expresses his preference for "easy" marriage. We cannot see that there has been, or is, any such tendency—except, as there should be, in the case of the evil disposed. In case of marriages of proper persons there has never been found any such difficulty. When the gentleman has made up his mind, and the lady has given her consent, the worst is over, the law smiles benignly upon the union, and the formalities which precede the function of the priest are "as easy as lying."

We trust that the General Assembly of New York will be able to devise a system of marriage licenses which will extirpate the evils that the present movement is designed to remedy.

ENGLISH SOCIALIST ORATORS.—The recent London riots have raised two legal questions; one whether the speakers at the public meetings preceding the riots, whose oratory, as it is alleged, caused and incited the violence, are criminally, responsible, and if so to what extent; the other, who pays the piper, who

suffers the loss, or defrays the damages. The *Solicitors' Journal* of London of recent date thus expresses its view on the two questions: "Speakers who suggest the violent appropriation of other people's property as a remedy for social ills, may lay themselves open to criminal charge in two forms. Whether or not their advice is taken, they are liable for the misdemeanour of inciting to crime. If their advice is taken in their absence, they are liable as accessories; if in their presence, they commit the same crime as those whom they instigated. The crime committed by the rioters in Piccadilly and elsewhere, besides robbery, is that of being riotously and tumultously assembled and forcibly injuring buildings, the maximum punishment for which is two years' imprisonment or seven years' penal servitude. The sufferers are not entitled to compensation under the Riot Act, unless the rioters intended and began to demolish whole houses (Drake v. Footit, 50 Law J. Rep. M. C. 141); and even in that case the compensation is confined to the injury done to the houses, and does not extend to loss from robbery. This fragment of liability is all that is left of the ancient law, making all the inhabitants of a district responsible in damages for violence within it. The district responsible is ordinarily the hundred, of which there are six in the county of Middlesex. The houses damaged, besides those in the city, which is responsible for itself, are in the hundred of Ossulston, which includes Finsbury, Holborn, Kensington, the Tower, and Westminster, although it might be contended that Westminster, being legally a city, is, like the city of London, solely responsible for the sins committed within its boundaries."

The practical difficulty on this subject is to distinguish between the free speech to which all men are entitled, and the incitement to crime which is in itself crime. If any rule at all can be laid down, it is, that if a speaker confines himself to the enunciation of general doctrines without immediate and specific application to particular persons or things, he is safe, no matter how inflammatory may be his language, nor how wide spread and intense his influence. As however he descends from the safe heights of glittering generalities to more definite topics, relating to particular persons or even limited classes of persons, he enters into a debatable land in which the theorist may be merged into a conspirator.

For this reason convictions of offences of this character are rarely secured. A man for example may make an incendiary speech, and immediately thereafter riot, sedition and robbery occur, in which his hearers participate. Morally speaking there can be little doubt that the speech caused the riot, but in a legal point of view the matter is not so clear.

Post hoc. propter hoc, is an inconclusive argument. It does not follow because the speaker expressed his views upon general social questions in the strongest and most impassioned manner, that he is technically *particeps criminis* in the offence of wrecking the shop of Jones, and carrying off his goods.

A conviction for crime must be founded upon specific acts and definite intent; it is strictly limited to the act for which the indictment is found, and there is necessarily much difficulty in connecting the very concrete fact of a robbery of goods, with a general, abstract, often vague and airy enunciation of social and political doctrines and principles.

We believe therefore that there will be much difficulty in making the socialist speakers on the occasion referred to, criminally liable for the outrages committed under their tuition.

NOTES OF RECENT DECISIONS.

THE LAW OF LARCENY.—There was recently presented to an English court a question on the law of larceny which seems to have puzzled it not a little. The facts were that the prisoner asked the prosecutor to lend him a shilling and received instead a sovereign which was given by a mistake, of which both parties remained for sometime in ignorance. When the prisoner became aware of the value of the coin he straightway appropriated it to his own use, and when the lender became conscious of the loss he had sustained, he immediately demanded a return of the money, and not obtaining it, commenced a prosecution. The question was whether the prisoner was under these circumstances guilty of larcency, and upon this question the

court consisting of fourteen judges was equally divided.

The *Solicitors' Journal* of London thus states the arguments of the opposing bands of judicial combatants and its own views of the question as taken from the stand point of principle, not authority.[1]

If we rightly understand the substantial distinction between the views of the opposing parties upon the bench, it comes to this. One side says that, the possession of the coin having been parted with and transferred to the prisoner by the prosecutor's own act and lawfully received by the prisoner, there can be no larcency because there was no trespass. The case of lost goods, whice at first sight appears analogous, is not so, for there the owner has never intended to part with the possession; he does not know where his goods are, but he has all along the intention of retaining his dominion over them. The other side say, as we understand it, that the transfer of possession for the purpose in question cannot be accomplished by the mere physical transfer of the thing; it involves an accompanying act of the mind by both parties; the one must intend to transfer the possession of, and the other to accept the possession of, the thing; whence it follows that, if the thing actually handed over is not the thing of which the one intends to transfer the possession, and the other intends to accept the possession, there is no transfer of possession, and the subsequent fraudulent conversion of the thing will be a trespass and amount to larceny.

We believe that this latter line of reasoning involves a confusion between transfer of property and transfer of possession, things essentially distinct. A case was much relied upon by those who took this view—viz., the case of *Merry v. Green*,[2] where it was held that a person who bought a bureau at an auction, and subsequently finding money in a secret drawer in it, fraudulently appropriated the same, was guilty of larcency. But the answer made by the other side to the argument sought to be drawn from that case is that there is an essential distinction between the cases; there neither party intended the transfer of the money, for both were ignorant of its existence; but in the present case both parties intended a transfer of the identical piece of money that was transferred, only they did not know the nature of it. To this the suggested answer is that the legal idea of a transfer of possession involves a knowledge of the nature of the thing transferred, and a consent by the transferee to such transfer, and a man cannot consent to the possession of a thing while he is ignorant of the nature of it. Consequently, a transfer of possession under a mistake is no legal transfer at all. With all respect to the seven judges who took this view, we must confess we cannot follow it, either in point of principle or of common sense. It seems to us clear that there was an intention on the part of the prosecutor to transfer the possession of the particular coin, and on the part of the prisoner to receive possession of it. Such intention came into existence through a mistake; all the same it existed. They were ignorant of the true nature of the coin, and if the prosecutor had known it, he, no doubt, would not have formed the intention of parting with, and would not have parted with the possession of it, but it seems to us as plain as that two and two make four, that the possession, both actual and constructive, was parted with when the coin was handed over. If so, the first taking was innocent, and, according to the well-established principle of the law on the subject, there could be no larceny. The case is quite different from that where the recipient of the chattel knows at the time of receiving it of the mistake made by the transferor; as in the case put of a cabman knowingly taking a sovereign given to him in mistake for a shilling. There the original taking is guilty; here it is innocent.

We understand the argument on the other side to be this. It is said that no doubt the original actual possession of the prisoner was innocent, because the constructive possession of the prosecutor continued uninterfered with till the prisoner appropriated the coin, and, in the eye of the law, he then, for the first time, took it out of the prosecutor's possession. But it seems to us that there are very great difficulties, in point of legal principle and of fact, in the way of that contention, and that it runs counter to the tendency of many decisions. We understand very well that a servant's actual possession can be the

[1] Queen v. Ashwell, (L. R.) 16 Q. B. D. 190.
[2] (7 M. & W. 623).

constructive possession of the master, because he is a servant, or merely the *alter ego* for some purposes of the master; but the prisoner here stood in no such relation to the prosecutor. On what principle can the actual possession of A. be the constructive possession of B., unless there is some relation between A. and B. of a representative character? The cases with regard to larceny of a lost chattel all seem to go on the principle that, though the chattel till found is in the constructive possession of its owner, when another finds it and takes possession of it it ceases to be so, and, therefore, unless the intent of the finder at the time of taking possession is felonious, there is no larceny. We should like to ask this question: Could the prosecutor have maintained trespass *de bonis asportatis* against the prisoner in respect of his possession of the coin? Surely not; because the coin was out of his possession. Surely his action would have been trover or detinue. It seems to us, as we have said, that the judgments of the judges who sustained the conviction confuse together the notion of parting with the possession of, and parting with the possession of, and parting with the property in, a chattel."

We are disposed to concur with our English contemporary, believing that to constitute larceny at common law, there must be such a taking as would authorize a action of trespass *de bonis as postatis*, and that the taking and conversion must be against the will of the owner simultaneous, and both under the influence of the *animus furandi*. Nevertheless it may be well to examine a few American decisions upon this question and point out the distinctions which exist between these cases and that under consideration.

The authorties are ample to show that where the taking is not a change of possession but merely of custody, as where a butler has charge of plate or a coachman of provender the appropriation is larceny.[3] In such cases the possession of the servant is held to be constructively the possession of the master, the subordinate holds the chattel upon an express trust limited to specific and definite purposes, and his actual possession is not held to be a possession at all in the legal sense of the word, but merely a custody; he acts only as the mechanical substitute of his master who does not in any sense relinquish the control of his property. He may at any moment discharge his servant and resume personally the actual custody of the goods. And in case of goods lost or mislaid, the possession of the owner constructively continues. His property, though lost to sight, is nevertheless constructively in his possession, and the finder who appropriates it may come to grief.

In an old New York case a customer left his whip on the counter of the prisoner's store, and he finding it there, put it away and afterwards denied that it had been left there at all. He was convicted of larceny.[4] And where the payee of a draft received in silence a large sum of money, much more than his draft called for, he was convicted of larceny.[5]

The first of these cases differs from that under consideration in this, that the owner of the whip never intended to part with either his property in the article, or its possession; in the second case the actual receipt of the money was simultaneous with the resolution to appropriate it, the report not indicating that he was under any mistake as to the amount.

In a Massachusetts case[6] it was held that the taking by a miller of a part of a substance delivered to him to be ground was larceny. And in an Alabama case, a slander suit the imputation being larceny an opposite conclusion was reached and it was held that a bailee could not be convinced of larceny.[7] In Virginia again on the other hand, a landlord lent his gun for use to a boarder who sold it and was convicted of larceny.[8]

An Oregon case more nearly than any of these resembles the case under consideration. The defendant asked the prosecutor to change a ten dollar gold piece. The latter being, presumably, in slang phrase "rich and careless," handed him a rouleau of ten twenty dollar gold pieces supposing the package to contain ten silver dollars which the latter received being under the same impression.

[3] Wharton Cr. Law, §§ 956 *et seq.*

[4] People v. McGarren, 17 Wend. 460.

[5] Wolfstien v. People, 6 Hun. (13 N. Y. Sup. Ct. N. Y.) 121.

[6] Commonwealth v. Games, 1 Pick. 375.

[7] Wright v. Lindsay, 20 Ala. 428.

[8] Richards' Case 13 Gratt. 803.

Upon discovering his mistake the prosecutor demanded his money which the prisoner refused to refund, and even declined to give his note for the amount, which was as little as could reasonably be expected of him.

The prosecution which followed resulted in a conviction for larceny, and the judgment was affirmed by the Supreme Court. The ground taken by that tribunal was that the owner did not voluntarily part with his money, because there was no intelligent assent to the transfer, consequently the taking was *invito domino*.[9]

This case is almost identical with the English case under consideration, but it may be observed that the Oregon court indulges in no prolonged investigation of adjudged cases, but arrives at the conclusion, *per saltum*, as it were, that a man who having received two hundred dollars by mistake when he was only entitled to ten dollars and then had the cheek to refuse to the bereaved owner the poor satisfaction of his promissory note was essentially a thief *ab initio* and treated him accordingly.

We concur fully in the court's opinion as to the moral character of the prisoner, but nevertheless doubt whether his offence, flagrant as it was, quite amounted to technical larceny at common law.

[9] State v. Ducker, 8 Oreg. 394.

RISKS ATTENDING THE PURCHASE OF CERTIFICATS OF STOCK.

A certificate of stock in an ordinary business corporation, is a declaration under the seal of the company, that the holder is entitled to a certain number of the shares, into which its capital is divided, transferable on its books, upon surrender of the certificate.

These instruments, framed with a view to the convenience of the public, afford an excellent basis of credit, and pass from hand to hand as readily as negotiable paper; yet owing to the peculiar nature of shares of stock, and the fact that title to them depends not only upon the certificate, but upon the record of ownership on the books of the company, their assignment is attended with risks that traders are apt to disregard.

It is proposed to briefly consider these risks, and to point out the way to obviate them.

I. The purchaser of a certificate gets no better title than his vendor has at the time of the sale.[1] A certificate of stock is not a negotiable instrument; it has none of the attributes of negotiable instruments.[2]

a. Therefore if a man steal[3] or find[4] an indorsed certificate, he can convey no title to the stock, even to a *bona fide* purchaser for value; the mere possession of an indorsed certificate, not being conclusive evidence of ownership. In this respect, shares of stock stand on the same footing as other personal property. A suggestion that the indorsement of the certificate was such evidence of negligence on the part of the owner as to stop him from claiming the property was not entertained, because even granting that such indorsement was negligent, yet it was not the immediate cause of the injury, nor a breach of any obligation due to one who purchases from a thief.[5] Where, however, the owner of stock indorses his certificate and delivers it to a broker to be sold for his account, such owner cannot complain if the broker pledge the stock to secure his own debt.[6] "The law merchant validates, in the interest of commerce, a transaction which the common law would declare void for want of title or authority, and transfers within its operation, are as absolutely valid and effectual, as if made with title or authority."[7] "An agent may bind his principal within the limits of the authority with which he has been apparently clothed with respect to the subject matter."[8]

b. Where a certificate is indorsed and de-

[1] Mechanics Bank v. N. Y. & N. H. R. R., 13 N. Y. 599.

[2] Barstow v. Mining Co., 17 Rep. 269; Weaver v. Borden, 49 N. Y. 286; Mechanics Bank v. N. Y. & N. H. R. R., *ante*.

[3] Swan v. N. B. Aus. Co., 7 H. & N., 633; Barstow v. Mining Co., *ante*.

[4] Buffalo Co. v. Alberger, 22 Hun, 352.

[5] Swan v. N. B. Aus. Co., *ante*; Freeman v. Cooke, 2 Exch. 654.

[6] Leavitt v. Fisher, 4 Duer, 21; Pichering v. Bush. 15 East, 43; Jarvis v. Rogers, 13 Mass. 105; M'Niel v. Tenth Nat. Bank, 46 N. Y. 329; Weaver v. Borden, 49 N. Y. 286; Mt. Holly &c. v. Ferree, 17 N. J. Eq. 117; Arnold v. Johnston, S. C. Cal. Feb. 3, 1885; Arnold v. Meyer, 19 Rep. 562.

Swan v. N. B. Aus. Co., *ante*.

[8] Pichering v. Bush., *ante*.

livered by the person to whom it was issued, the assignee will get nothing, if prior to the assignment the stock had been attached[9] or sold[10] as the property of the assignor. The certificate is not the stock. It is one evidence of the ownership of the stock; in all cases where the charter or authorized by-laws of the corporation require that transfers shall be made on the books of the company, the books are better evidence." The principle underlying such cases obviously is, that the transfer on the books operates to transfer the title, and that where a party has parted with or been divested of his title by the only proper mode of transfer, he has nothing to sell, notwithstanding the fact that he holds the certificate.

c. It has sometimes happened that certificates of stock are fraudulently issued by an officer of a corporation, in excess of the amount authorized by its charter. In such a case, although the certificates are in all respects like others, properly issued, and are purchased in good faith for value, yet they will not entitle the holder to an interest in the company.[12] Any other rule would permit a corporation to transcend the law of its creation. It has even been doubted whether, in such a case, the purchaser has a right of action against the corporation for the fraud of its agent.[13]

d. Every transfer of certificates of stock is subject to the rights of the corporation issuing them. These rights arise out of the provisions of its charter or by-laws, and sometimes out of well established customs of trade.[14] Where therefore, the charter or by-laws secure to the corporation a lien upon stock for advances to its stockholders, an assignment of a certificate is always subject to the rights of the company, which attach before it has notice of the assignment,[15] and, if the charter authorize a company to forfeit stock for non-payment of assessments, the stock may be forfeited without notice to the holder of the certificate, in the absence of information that the stock has been transfered.[16] The company is not bound to go beyond its books to determine who are responsible for obligations due it.[17]

The preceding risks grow out of infirmities in the title of the vendor, existing at the time of the attempted transfer. They may be obviated by inquiry of the corporation at the time of the purchase of the certificate or as in the first case, by inquiry of the original holder of the stock.

II. Certain infirmities in the title of the vendee of the certificate may arise after the time of the purchase. Wherever the charter or authorized by-laws of a corporation require transfers of stock to be made on its books, a purchaser of a certificate, who neglects to comply with this requirement, thereby subordinates, his right to the rights of others properly attaching after the sale, but before its registration.

a. The right of a corporation making an anvance secured by a lien on its stock, after a transfer of the certificate, but before it receives notice of the same, is superior to the right of the certificate holder.[18]

b. A purchaser from a record holder of stock, by a transfer on the books of the company, has a better right than the holder of the certificate even where the certificate was assigned before said transfer. It may fairly be assumed that the title is where, on the books of the company, it appears to be, and a purchaser will be protectedin acting on such assumption.[19]

c. A creditor levying prior to the registra-

[9] C. & O. R. R. v. Paine, 39 Gratt. 502; S. V. R. R. v. Griffith, 76 Va. 913; Eastman v. Fiske, 9 N. H. 182.

[10] N. Y. & N. H. R. R. v. Schuyler, 34 N. Y. 79.

[11] Lippitt v. Wood Paper Co., 1 N. E. Rep. 118; Bank v. Laird, 2 Wheat, 390.

[12] Express Co. v. Ins. Co., 14 Rep. 83; Scovill v. Thayer, 105 U. S. 143.

[13] Mechanics Bank v. N. Y. R. R., 13 N. Y. 599.

[14] Morgan v. Bank of North America, 8 S. & R. 73.

[15] St. Louis P. F. Ins. Co. v. Goodfellow, 9 Mo. 154; Sparlock v. R. R. Co., 61 Mo. 319; Bank of America v. McNiel, 10 Bush. 58; Stebbens v. Ins. Co., 3 Paige 350: Reese v. Bank, 14 Md. 271; Lockwood v. Bank, 9 R. I. 308; Grant v. Bank, 15 S. & R. 143; Case v. C. Bank, 100 U. S. 446; Arnold v. S. Bank, 27 Barb, 424.

[16] Thompson, Liabilities of Stockholders, § 196; Canal Co. v. Sanson, 1 Binn. 70; Small v. Manf. Co., 2 N. Y. 330; Herkimer v. Small, 21 Wend. 273; Glass Co. v. Alexander, 2 N. H. 380, and 34 N. H. 147.

[17] Chouteau Sprs. Co. v. Harris, 20 Mo. 385; Moore v. Bank, 52 Mo. 379; Mo. Bank v. Richards, 6 Mo. Ap. 463; Helm v. Swigget, 12 Ind. 196; Adderly v. Storm, 6 Hill 627; Dane v. Young, 61 Me. 168; Boston M. H. Ass. v. Cory, 129 Mass. 437; Shillington v. Howard, 53 N. Y. 371.

[18] Conant v. Reid, 1 Ohio St. 298; Stebbens v. Per. Ins. Co. 3 Paige 350; Union Bank v. Laird, 2 Wheat, 390; Bk. of Am. v. McNiel, 10 Bush. 58; McReady v. Rumsey, 6 Duer, 574.

[19] Johnson v. Laflin, 103 U. S. 804; Cady v. Potter, 55 Barb. 466; N. Y. & N. H. R. R. v. Schuyler, 34 N Y. 79.

tion of a transfer, but after the assignment of the certificate, has a better right than the purchaser of the certificate, in the absence of knowledge of such transfer, according to the opinions delivered in the following cases,[20] although this point is by no means settled.[21] At present it would be unsafe to advise which view of the matter should prevail. This is certain however, that a purchaser of stock who neglects to perfect his title, by a transfer on the books, runs a grave risk in the event of the insolvency of the vendor, wherever the question is an open one.[22]

In the light of the adjudicated cases, it is remarkable that business men should be content to rely upon indorsed certificates. These instruments do not afford a safe basis for credit. A title thereby acquired, may be imperfect at the time of purchase and may be defeated even after purchase, yet millions of money are daily loaned on such securities, and not one transfer of corporate stock in ten, is ever actually recorded.

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[20] I Red. Am. R. R. Cases, 127; Fisher v. Essex Bank, 5 Gray 381; Black v. Zacerie, 3 How 483; Scripture v. Soapstone Co., 50 N. H. 583; Coleman v. Spencer, 5 Black, 198; People Bank v. Gridley, 91 Ill. 457; People v. Mnfg. Co., 99 Ill. 360; Sabin v. Woodstock, 21 Vt. 350; *In re* Thos. Murphy, 51 Wis. 522; Fiske v. Carr, 20 Me. 301; Skawhigan Bank v. Cutler, 49 Me. 315; Farmers Bank v. Wilson, 58 Cal. 600; Boyd v. Mill, 7 Gray 408; Blanchard v. Gas Light Co., 12 Gray, 215; Rock v. Nichols, 3 Allen, 342; Shipman v. Ins. Co., 29 Conn. 253.

[21] U. S. v. Vaughn, 3 Binn. 400; Commonwealth v. Watmough, 6 Whart. 138; Finneys Appeal, 59 Pa. St. 398 Bank v. McElrath, 13 N. J. Eq. 26; Smith v. Am. Coal Co., 7 Lans. 317; Frazer v. Charleston, 11 S. C. 520; Smith v. C. C. S. H. Co., 30 La. An. 1378; Friedlander v. S. H. Co., 31 La. An. 525; Scott v. Pequonnock Bk., 15 Rep. 500; Continental Bank v. Elliot Bank, 7 Fed. Rep. 370; Boston M. H. Ass. v. Cory, 129 Mass. 437; Dickinson v. Cent. Nat. Bank, 129 Mass; Sibley v. Quincy, N. B. 133 Mass. 515.

[22] Johnson v. Laflin, 103 U. S. 804.

EVIDENCE OF INTENT.

The intent with which an act is done, or the motive for doing it, is often a matter of prime importance, not only in criminal cases but in civil cases as well. Intent and motive are two different things, the motive being that which causes or induces the act, and the intent being the purpose for which it is done; but the two words are often used interchangeably in the authorities, and the distinction, while proper, is not always a necessary one. While our attention, therefore, will be chiefly given to a consideration of the law governing evidence of intent in its proper sense, the law in regard to proof of motive will also be considered to some extent. Intention or motive being a state of mind internal and invisible except through outward manifestations, its existence must usually be a matter of inference or presumption from the outward or visible acts and manifestations, which serve to indicate more or less clearly and conclusively the particular intention.[1] *Exteriora acta indicant interiora animi secreta.*[2] "The force of the inference," says Starkie, "results from the consideration that the intention of a rational agent corresponds with the means which he employs, and that he intends that consequence to which his conduct naturally and immediately tends."[3] Formerly, therefore, when parties were not competent witnesses, the usual, and, in general, the only, way of proving intent was by evidence of such conduct, or such outward acts and circumstances as tended directly, or indirectly, to show the particular intent.[4] But where parties are allowed to testify, it is now generally held that intention is, in a sense, a fact to be proved as any other fact, and that, when material, a party may testify as to his own intention.[5] This seems in accordance with common sense, for no one can tell better what an act was intended to accomplish, or what motive prompted it than the person who did the act. Of course such evidence may not be of the greatest weight, but it ought nevertheless to be admitted in proper cases, and taken for what it is worth. Such evidence was excluded at common law because parties were not competent witnesses on their

[1] 2 Starkie on Ev. *739; Zimmer v. Miller, 1 Atl. Rep. 858, 859; Hough v. Dickinson, 24 N. W. Rep. 812.

[2] 8 Co. 146.

[3] 2 Starkie Ev. *739.

[4] Zimmerman v. Marchland, 23 Ind. 474, 476; Com. v. Stone, 4 Metc. 43; Broom's Com. 874; 1 Stark. Ev. *30.

[5] Starin v. Kelly, 88 N. Y. 418; Thurston v. Cornell, 38 N. Y. 281; Greer v. State, 53 Ind. 420; Hale v. Taylor, 45 N. H. 405; Lawton v. Chase, 108 Mass. 241; Over v. Schiffling, 102 Ind. 191; Berkey v. Judd, 22 Minn. 287; Lombard v. Oliver, 7 Allen, 155; Wheelden v. Wilson, 44 Me. 1; Mickey v. Burlington Ins. Co. 35 Ia. 174. But see, *contra*, Oxford Iron Co. v. Spradley, 51 Ala. 171.

own behalf regarding any subject, but the reason for such a rule having ceased, the rule itself should cease.

There are thus two general modes of proving intent. There are limitations, however, upon each mode, and it may be well to consider in detail, first, to what extent and in what cases evidence of conduct and surrounding circumstances is proper, and, second, when and under what circumstances a party may testify as to his own intent.

The first mode of proving intent is founded upon experience gained by a study of human nature, whereby it is found that all men are largely influenced by the same motives, and that certain acts indicate certain intentions. Therefore proof of such acts is, circumstantially, at least, proof of the intention which usually accompanies them. The inference to be drawn from the acts and circumstances is usually one of fact for the jury to determine; but there are some instances where, as experience has shown, there can be but one reasonable inference, which of necessity arises from the facts as they stand otherwise unexplained. In such cases the law itself fixes and determines the inference, which is called a presumption of law. Thus the rule is firmly established that every person is presumed to contemplate the ordinary and natural consequences of his own acts.[6] And this rule is applied even in criminal cases.[7] Thus from the uttering of a forged document, the law presumes an intent to defraud the person who would naturally be affected thereby.[8] So where one sets fire to a building the presumption is that he intended to destroy it,[9] and also that he intended to injure the owner.[10] So, also, where a baker delivers adulterated bread to a public asylum, the presumption is that he intended it to be eaten.[11] And again, when one man kills another by the voluntary use of a deadly weapon, the law presumes that the killing was intended.[12] In such cases it may be said, *res ipsa in se dolum habet*,—the acts are evil and show a wrong intention in themselves. But, in most cases the intention is not so clearly or conclusively shown that the law itself can draw the inference, and it is necessary to prove acts and circumstances from which the court or jury may draw the inference as a fact. As said in a recent case, "intention is an inferential fact to be drawn by the jury from proven attendant facts and circumstances."[13] The question then arises, What are the "attendant facts and circumstances" that may be properly given in evidence? It may be stated generally that all the attendant and surrounding facts and circumstances tending directly or indirectly to throw light on the intention, may be given in evidence, unless excluded by some other rule of evidence applicable to the particular case.[14] It is also stated by Stephens in his Digest of Evidence,[15] that, "when there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is deemed to be relevant." Thus even in cases where the intention of the parties to an ambiguous written contract is to be determined, it is well settled that the contract is to be read "in the light of surrounding circumstances."[16] So, in criminal prosecutions, evidence of other acts contemporaneous with the principal transaction may often be admitted to show criminal intent.[17] And it has been held that the manner of one accused of passing coun-

[6] Holmes v. Holmes, etc., Co., 37 Com. 278; Laurence v. State, 68 Ga. 289; City of Columbus, v. Dahu 36 Ind. 330, 337; 3 Greenleaf Ev., § 14; Lawson Presumptive Ev. 262; Binford v. Johnston, 82 Ind. 427; s. c. 42 Am. Rep. 508.

[7] 1 Bish. Crim. Pro., § 486; Commonwealth v. York, 9 Met. (Mass.) 93; s. c. 43 Am. Dec. 373; Wharton's Crim. Law (4th ed.), § 712.

[8] Rex. v. Sheppard, Rus. & Ry. 169; Rex v. Mazagora, Id. 291.

[9] People v. Orcutt, 1 Park. C. C. 252.

[10] R. v. Farrington, Rus. & Ry. 207.

[11] King v. Dixon, 3 M. & S. 12.

[12] Com. v. York, 9 Mete. 93; State v. Holme, 54 Mo. 153; Com. v. Drum, 58 Penn. St. 17; Lawson's Presumptive Ev. 266; 1 Bishop Crim. Pro., § 486.

[13] Burke v. State, 71 Ala. 377; s. c. 5 Crim. L. Mag. 912.

[14] Padgett v. State, 3 N. E. Rep. 377; Com. v. Titus, 116 Mass. 42; s. c. 17 Am. Rep. 138; Zimmer v. Miller, 1 Atl. Rep. 858; Farrell v. State, 32 Ohio St. 456; s. c. 30 Am. Rep. 614, 616; Com. v. Ratcliffe, 11 Cent. L. J. (Dig.) 514; Parrish v. Thurston, 87 Ind. 437: Haskins v. People, 16 N. Y. 344. And see article on "*Animus Manendi*," 21 Cent. L. J. 430.

[15] Stephen's Dig. Ev. (May's Ed.) 61; approved in People v. Shulman, 80 N. Y. 373.

[16] Bates v. De Haven, 10 Ind. 319, 321; 2 Pars. Cont. 74; Nash v. Towne, 5 Wall. 689; Heath v. West, 68 Ind. 548; 1 Greenlf. Ev., §§ 277, 287.

[17] Rex v. Long, 6 Car & P. 179; White v. State, 11 Tex. 769, 773; Dibble v. People, 4 Parker C. C. 199; People v. Lopez, 59 Cal. 362; Com. v. Stone, 4 Met. 43; 3 Greenlf. Ev., § 19.

terfeit money, at the time of passing it, may be shown, as tending to prove guilty knowledge and intent.[18]

Not only are contemporaneous acts and circumstances allowed to be shown as explanatory of the intent, but other acts of a similar character, or done with a similar intent, although committed before or after the doing of the principal act, may often be given in evidence.[19] But where subsequent facts are relied on they must be shown to have some intimate connection with the principal fact.[20] It was at one time much questioned whether, if the evidence of other acts offered to prove intent, at the same time proved the commission of another crime, that fact did not render it inadmissible; but the law now seems to be well settled that such fact alone will not render it incompetent, if it is otherwise admissible.[21]

While the only way that one can judge of another's intent is by his acts and conduct, and while, therefore, one cannot testify directly as to another's motive or intent,[22] yet, as already stated, there are many cases in which it is proper for a party to testify as to his own motive or intent. Thus, in dedication cases, in which the intention of the land owner to dedicate or not to dedicate, is always an element of prime importance, he may generally testify as to the intent with which he did the acts claimed as evidencing or rebutting the dedication.[23] But where, in such cases, the acts and conduct of the owner are such that the natural consequence thereof is to lead others to believe that he intended to dedicate his land to the public use, and they have in good faith acted and acquired rights under such belief, he will not be permitted to show a contrary intention; for it is his open and not his secret intent that must govern.[24] So in questions of domicil, where the *animus manendi* determines the character of the residence, one may testify directly as to his intention in "setting up his tabernacle" in a particular place or country.[25] The question often arises as to whether a particular act was done with a fraudulent intent, or not, as, for instance, whether a transfer of property or an assignment was made to defraud creditors, and the like. In such cases it is competent to prove by the actor directly what his intention was.[26] Thus in the leading case of Seymour v. Wilson,[27] where the question at issue was, as to whether an assignment had been made to hinder and defraud creditors, the judgment of the lower court was reversed, because of error in refusing to permit the assignor to be questioned as to his intention in making the assignment. So in an attachment proceeding, it was held that the defendant might testify directly as to his intention in disposing of his property and attempting to leave the State.[28] It has also been held that a public officer may testify as to his intention and good faith in doing an official act.[29] So, it is held, one may testify as to his intention to give credit to another,[30] or with what intent a payment was made.[31]

Intention may sometimes be proved directly in criminal as well as civil cases. Thus in a criminal prosecution for obtaining goods under false pretenses, the evidence of the defendant that he did not obtain or receive the goods with any intent to cheat or defraud, is competent.[32] So in a prosecution for larceny, the defendant may testify as to what his

[18] Butler v. State, 22 Ala. 43. But see State v. Middleham, 17 N. W. Rep. 446; 18 Cent. L. J. 56.

[19] Goersen v. State, 99 Penn. St. 388; Rex v. Ball, 1 Camp. 324; Rex v. Smith, 4 C. & P. 411; State v. Mix 15 Mo. 153; Williams v. State, 8 Humph. 585; Commonwealth v. McCarthy, 119 Mass. 354; U. S. v. Russell, 19 Fed. Rep. 591; 18 Cent. L. J. 318; Porter v. Stone, 17 N. W. Rep. 654.

[20] 3 Greenf. Ev. § 15. And see State v. Daubert, 42 Mo. 242, 246.

[21] Dunn v. State, 2 Ark. 229; s. c. 35 Am. Dec. 54; Shriedly v. State, 23 Ohio St. 130; Bersh v. State, 13 Ind. 434; Regina v. Dorsett, 2 C. & K. 306; Commonwealth v. Bradford, 126 Mass. 42; State v. Biggs, 39 Conn. 498; Roscoe's Crim. Ev. *95; 1 Bishop Crim. Pro. § 493, and authorities there cited. But see State v. Goetz, 34 Mo. 85; and compare State v. Harrold, 38 Mo. 496.

[22] Clement v. Cureton, 36 Ala. 120; 1 Whart. Ev. § 508.

[23] Bidinger v. Bishop, 76 Ind. 245.

[24] City of Indianapolis v. Kingsbury, 101 Ind. 201; Denver v. Clements, 3 Col. 484; Lamar Co. v. Clements, 49 Tex. 347.

[25] Kennedy v. Ryall, 67 N. Y. 380; Fisk v. Chester, 8 Gray 506. And see article on "The *Animus Manendi* in Relation to Domicil," 21 Cent. L. J. 430.

[26] Sedgwick, admr. v. Tucker, 90 Ind. 271; Starin v. Kelly, 88 N. Y. 418; Watkins v. Wallace, 19 Mich. 57, 76; Bedell v. Chase, 34 N. Y. 386. Wait on Fraud. Conveyances, §§ 205, 206. *Contra*, Hathawayv. Brown, 18 Minn. 414.

[27] 14 N. Y. 567.

[28] Shockey, *et al.* v. Mills, 71 Ind. 288.

[29] Cortland Co. v. Herkimer Co. 44 N. Y. 22.

[30] Danforth v. Carter, 4 Ia. 230.

[31] Abb. Tr. Ev. 265.

[32] People v. Baker, 96 N. Y. 340.

intention was, at the time of the taking, in regard to taking and converting the goods or property to his own use.[33] And where, on the trial of an indictment for assault and battery with intent to commit a felony, the defendant became a witness in his own behalf, it was held competent for him to testify as to what his intention was in committing the alleged assault and battery.[34] Indeed the rule of law upon this subject seems, in general, to be the same in criminal cases where the question of intent is material, as it is in civil cases.[35]

But it is not in every case, either civil or criminal, that such evidence is admissible. For instance, the intent may not be material,[36] or the case may be one in which there is some element of estoppel or some other reason why a secret or hidden intent may not be shown.[37] In all these cases such evidence is inadmissible.

The law on the general subject of evidence of intent is well stated by Smith, J., in the case of Delano v. Goodwin, as follows:[38] "Before the statute making parties competent witnesses, the ordinary way to prove their intent or understanding was by circumstantial evidence. But now that the party himself is admitted to testify, there is no reason for confining his testimony to a variety of circumstances tending to show his purpose or understanding, when he knows and can testify directly what that purpose or understanding was. Accordingly * * * where the intention or good faith of a party to a suit becomes material, it may be shown directly as well as from the circumstances, and the party himself, if a competent witness, may testify directly to his intention or understanding, unless prevented by some other principle of law applicable to the particular case."

W. F. ELLIOTT.

Indianapolis, Ind.

[33] White v. State, 53 Ind. 595; Smith v. State, 13 Tex. App. 507.

[34] Greer v. State, 53 Ind. 420.

[35] In addition to the authorities already cited in these notes, see People v. Farrell, 31 Cal. 576; Smith v. State, 13 Tex. App. 507.

[36] Brown v. Champlin, 66 N. Y. 215; Craighead v. Peterson, 72 N. Y. 279, 286; Welch v. State, 3 N. E. Rep. 850.

[37] City of Indianapolis v. Kingsbury, 101 Ind. 200; Waugh v. Fielding, 48 N. Y. 681; Abb. Tr. Brief 93; City of Columbus v. Dahu, 36 Ind. 330.

[38] 48 N. H. 203, opinion 205.

BENEFIT ASSOCIATION—WHO MAY BE BENEFICIARY AND HOW APPOINTED.

SUPREME LODGE KNIGHTS OF HONOR V. GEO. K. NAIM AND FRANCIS T. RICHARDSON

Supreme Court of Michigan, Feb. 10, 1886.

1. In a mutual benefit association, whose certificates of membership and regulations recognize the right of the member to change his beneficiary, such change can be made only in the particular mode pointed out in the rules of the association.

2. Where the regulations of the association require the actual surrender of the certificate, and a written direction in a particular form, for the issuance of a new one, to be attested by an officer of the subordinate lodge, as a prerequisite to the change of beneficiary, the purpose is evident that the association shall always be in written contract relations with the member, such as will clearly identify the beneficiary, and this purpose will be sustained by the courts, as a valuable guard against fraud and forgery.

3. A partial execution by the member of written directions for a change of beneficiary, which are not intended to be completed by him before his death, does not amount to a revocation of the appointment of the existing beneficiary, nor prevent the vestiture of her rights as such upon the death of the member.

4. Where the charter of the association limits the beneficiaries to persons belonging to the family of the member or dependent upon him, one who is a mere creditor and neither an actual relative or actual dependent of the member cannot be made a beneficiary.

James O. Pierce, of Memphis, Tenn, and *W. C. Jones*, of St. Louis, for complainant; *A. R. Avery*, of Port Huron, for defendant Naim; *J. H. Brewster*, of Detroit, for defendant, Richardson.

CAMPBELL, C. J., delivered the opinion of the court.

Complainant filed a bill of interpleader to settle the contending claims of the two defendants to a sum of $2,000, under a member's benefit certificate issued to Harry Traver, now deceased, who was a member of one of the subordinate lodges of the association represented by complainant.

It appears from the record that the Order of which complainant is a corporate representative, or various associations connected with it, became at different times incorporated in different States. It also appears that there is a general association to which the smaller bodies are said to conform, having local lodges incorporated and unincorporated.

Just how far the special corporations in different States govern those elsewhere, not incorporated, does not fully appear, and is not material in the present case. We have no judicial knowledge beyond the record, and need not inquire.

In the present case, Traver appears to have been a member of a lodge at Port Huron in this State, and the complainant, which is the body issuing the benefit certificate and bound to pay it, is a corporation organized under the laws of Missouri.

It is therefore in all its contract relations, sub-

ject to the conditions imposed upon its corporate powers by those laws, and no rules or conditions can be lawfully imposed, contrary to those laws, upon its corporate action, by any private association. It can make no contracts forbidden by the laws of Missouri to such corporations. And while the action of the un-incorporated Supreme Lodge may be of more or less service in construing ambiguous arrangements not forbidden, it cannot in any way supercede the statutes. The benefit certificate, which is dated July 16, 1881, after reciting membership of Traver, and some other similar matters and some conditions, concludes as follows:

"The said Supreme Lodge hereby agrees to pay out of the widows' and orphans' benefit fund, to his sister, Mrs. F. T. Richardson, the sum of two thousand dollars, in accordance with, and under the laws governing this Order, upon satisfactory evidence of the death of said member, and the surrender of this certificate. Provided, that this certificate shall not have been surrendered by said member, or cancelled at his request, and another certificate have been issued in accordance with the laws of this Order."

On the back of this certificate was a printed form: "I hereby surrender to the Supreme Lodge Knights of Honor, the within benefit certificate, and direct that a new one be issued to me payable to ————, signed ————. Attest. ————(Lodge Seal)————Reporter."

Upon the certificate in controversy, this blank was dated March 25, 1884, signed by Harry Traver, made payable to "George K. Nairn, in trust," but not signed or attested by the lodge reporter or by any one.

Defendant Nairn claims that by virtue of this endorsement the fund belougs to him. Defendant Mrs. Richardson claims that nothing has been legally done to divest her of the benefits promised to her by the certificate. Nairn claims that Traver was an army comrade and intimate friend, who had lived at his house several years, and became hopelessly ill from injury in the early part of 1684, which interfered with his doing any considerable share of business, and in October, 1884, he went to Ypsilanti for medical treatment, where he was under the care of an aunt and other near relatives and family connections, one of whom was a physician. He died at Ypsilanti in December, 1884.

Nairn testifies that while going to Ypsilanti, Traver told him he had placed a transfer of the certificate with other papers in an envelope which he had left in a bureau drawer in his room at Nairn's, and wished him to do according to the instructions which he would find there.

It does not appear very clearly when Nairn first looked at this envelope, but it was sealed and contained on the outside in black ink, "H. Traver," and in blue pencil mark: "For Geo. Nairn in case of my death."

After Traver's death, it was opened by Nairn in presence of some of Traver's relatives, and it then contained the certificate endorsed as before stated as of March 25, 1884, and a letter of the same date as follows:

"PORT HURON, March 25, 1884.

"*Reporter of Integrity Lodge, Knights of Honor*:

"SIR—I desire to have the beneficiary in my certificate of membership changed from Mrs. F. T. Richardson to George K. Nairn, in trust, and in the event of my death two thousand dollars to be paid to him. HARRY TRAVER."

There was also a letter in blue pencil, dated June 24, 1884, directed to Nairn, and endorsed "George K. Nairn, in case of my death," the purport of which was a request to have his affairs straightened to pay a list of debts enclosed of about $359, and funeral expenses. and apply balance as directed in memoranda. The remainder of the letter explained his business matters and some other things. There was also a life insurance policy for $500, on the life of Mrs. Richardson, which he requested to have kept for her son. Also a letter dated October 15, 1884, (which was the date of his going to Ypsilanti), addressed jointly to his sister and aunt, requesting them in case of his death to confer and consult with Nairn and rely on him implicitly, saying, "He has been to me through 20 years or more as a brother, and is as dear to me as one."

There was no memorandum in regard to what were the terms of Nairn's trust in the fund, but Nairn says that on the way to Ypsilanti, Traver told him to take what was reasonably due him, and keep the rest in trust for his little girl. He also says that from the spring of 1884 he paid Traver's lodge dues and assessments at his desire, but never knew that the certificate had been assigned for his benefit till October, as before mentioned.

It is not claimed on either side that this certificate belonged to Traver as a part of his estate. It is admitted on both sides that he had a power of appointment to change the beneficiary. It is also clear that the beneficiary named in the certificate must take the fund unless there has been a valid appointment in favor of Nairn. It is claimed however, that there are two objections to Nairn's claim: First, that he is not such a person as could receive a benefit under the rules of the corporation; and Second, that no appointment ever became operative.

The Circuit Court for the County of St. Clair, ordered the money to be paid to Nairn. Mrs. Richardson appeals on her own behalf. The complainant appeals, claiming that certain provisions of the decree are injurious, as changing the conditions on which complainant can be bound.

The Constitution of the Order, as last adopted, in May 1884, is very explicit that benefits are to be paid on behalf of a member, "to such member or members of his family, or person or persons dependent on him as he may direct and designate by name," etc. The change of beneficiaries was

to be made by a member, "while in good standing," surrendering his certificate and receiving a new one payable as he shall have directed, "said surrender and direction to be made on the back of the benefit certificate surrendered, signed by the member and attested by the Reporter under seal of the Lodge." (Const. Art. 9, § 5.)

It appears that under a Kentucky charter, and under the Constitution as it stood previous to 1884, the benefits could be made payable to his family or as the member should direct. This apparently would have made Nairn a competent beneficiary if we can regard these constitutions as controlling the contract.

But this benefit is payable by a corporation of the State of Missouri, and the laws of that State very clearly and expressly forbid corporations of this sort from paying benefits to any but the member's family or dependants. (Rev. Stats of Missouri, p. 179, § 972.) This prohibition is strengthened by some further provisions making it unlawful to issue policies of life insurance, or for the benefit of the members themselves, in any shape. (§ 973.) The restrictions imposed by the laws of Missouri cannot be abrogated or changed by the corporation, and it cannot subject itself to any outside control which will override the laws of its organization as a corporate body.

The intent of the prohibition is clearly to shut out all persons who are not actual relatives or standing in place of relatives in some permanent way or in some actual dependence on the member. While the relations between Traver and Nairn were very intimate, they do not fairly come within the designation of family relations.

If there was any dependence, Traver and not Nairn was the dependent person. But taking Nairn's own answer and testimony together, it is shown that he expected under the alleged arrangement with Traver to apply this fund not only to the payment of other debts, but also to payment to himself as a creditor, leaving such surplus as he chose to leave to one of his own children.

The purpose of Traver thus indicated was not to provide a benefaction to a member of his family or person dependent, but to use the fund to pay debts;" a purpose which is honest, but which is entirely foreign to the benevolent objects of the association, which exclude the member from appropriating the fund to his individual purposes.

The other objection, however, is one which can not be surmounted. The written contract so far as it goes is the measure of the rights of all parties. By the express terms of that certificate, it is provided that Mrs. Richardson shall have the money unless the certificate is surrendered and cancelled, and a new one issued. And the form of surrender printed on the back conforms precisely to the clause also inserted in the Constitution requiring every surrender and new direction to be signed by the member and attested by the Reporter under the Lodge Seal, he being the officer into whose hands it must be placed for transmission to the home office for re-issue.

Under this arrangement, the purpose is evident that the corporation shall always be in written contract relations with a member who is alive and in good standing, which will show them the identity of the beneficiary to whom they are liable. It is possible, and we need not consider under what circumstances, that where a member has executed and delivered to the Reporter his attested surrender, in favor of a competent benficiary, his death before a new certificate is rendered, may leave his power of designation so far executed, as to enable a court of equity to relieve against the accideht. But in the present case the facts show conclusively that Traver did not mean to have any surrender made until after his death. Nairn was not authorized to open the envelope or handle any of the papers while Traver lived, and Traver retained complete control of them. No one was authorized while he lived to take any steps to complete a surrender.

The attestation of the Reporter was not a mere ceremony. In this very case, issue is made on the voluntary character and legal validity of Traver's alleged execution of the various papers. We are not disposed to consider that view of the case. But it is plain that the formality of appearing personally before an officer of the corporation or its lodges, and having the execution seen and attested by such an officer, would be a valuable guard against fraud and forgery, which was not provided for without some intention. In our opinion. Traver never surrendered this certificate, and never attempted to surrender it within either the letter or the spirit of its conditions, and the right of Mrs. Richardson remains as originally provided for.

We do not in reversing the decree mean to impugn any one's integrity. We dispose of the case purely on legal grounds, which leave us in our opinion no choice in the matter. The contract is one which the parties made on their own conditions, and every one is bound by them.

We do not regard the complainant's appeal as within the rules of interpleader, and while we shall not disturb the allowance of $50.00 made below, we can grant no further costs to it on appeal. The learned argument of the distinguished counsel representing it was instructive; but bore entirely in favor of one of the two defendants.

Mrs. Richardson is entitled to costs of both courts against Nairn, and to a decree for the money in controversy.

The decree below must be reversed, and a decree entered here in her favor.

MORSE, CHAMPLIN and SHERWOOD, JJ., concurred.

1. The charter granted by the legislature of the State of Kentucky to the Supreme Lodge Knights of Honor provided that the portion of the "Widows' and Orphans' Benefit Fund" to be paid out upon the death

of a member in good standing should "be paid to his family or as he may direct."

In the following named cases, this charter was construed. and it was held that this provision allowed the member to appoint a beneficiary outside of his own immediate family. Highland v. Highland, 13 Bradw. 510, 109 Ill., 374; Sup. Lodge v. Martin, 12 Ins. Law Jour., 628; Gentry v. Sup. Lodge, 20 Cent. L. Jour., 393.

It appears, however, that the complainant in the principal case, the corporation which offered to pay the benefit, and which filed the bill of interpleader, was a corporation under the general laws of the State of Missouri. These laws provide for a benefit to be paid, on the death of a member, to his family or dependents.

2. It is a general rule that where the charter of the society establishes a limited class or classes of beneficiaries can by the act of either the society or the member, be made a beneficiary.

In Masonic Ins. Co. v. Miller, 13 Bush., 489, the charter under which the society organized, and under which Miller became a member, authorized the benefit to be paid to the "widow and children of the deceased member." The society issued a certificate payable to Miller's "heirs or as he may direct in his will." Miller having died intestate, and leaving a widow but no children, it was held the charter must control, and that the society had no power to agree with the member upon a disposition of the benefit antagonistic' to the widow of the member.

In Van Bibber v. Van Bibber, (Ky.), 14 Ins. Law Jour. 290, the charter declared the object of the fund to be for families or relatives. It was held that no stranger could be made a beneficiary.

In Weisert v. Muehl, 81 Ky., 336, the charter provided that the fund be payable "to the legal heirs or beneficiaries" of the member; and Weisert, having a certificate payable to his heirs, like Traver in the principal case, wrote on the back of his certificate a direction that the fund be paid to a stranger; which attempted change was disregarded.

In State v. Mut. Relief Asso., 29 Ohio St., 399, the charter named "the families or heirs of deceased members" as the beneficiaries, and this charter was declared forfeited because the association had practiced the issuance of certificates to persons not members, on the lives of strangers.

A recent case in Massachusetts in Briggs v. Earl, 1 Eastern Reporter, 175, in which the charter named as beneficiaries the widow, orphans or other dependents of deceased members. Under this charter, it was held that a member joined by his wife, could not assign his certificate to a stranger so as to divest the title of the widow or estop her from claiming the benefit.

3. As a proposition of law, independent of the foregoing rules governing charactered societies, it has been frequently held that where the rules of the society provide a certain mode in which the beneficiary may be designated or changed, such mode must by duly observed, in order to vest any right in the new beneficiary, or divest the right of the former one. Hellenberg v. I. O. B. B., 94 N. Y., 580; Vollman's Appeal, 92 Penn. St., 50; Harman v. Lewis, (U. S. Ct. Mo.), 24 Fed. Rep. 97, 530.

In the recent crse of Coleman v. Supreme Lodge K. of H., 14 Ins. Law Jour., 635, the same rules were under examination as in the principal case, and the member had there also attempted to effect a change in a novel and irregular manner; and the St. Louis Court of Appeals (by Rombauer, J.), held: "It must be assumed that when the corporation framed a set of rules, providing in the most direct manner for the distribution of this fund and for the rights of beneficiaries, the manner thus prescribed was exclusive of all others. The expression of one thing is necessarily the exclusion of another and different thing."

In the late New Hampshire case of Eastman v. Provident Mut. Relief Asso., 20 Cent. Law Jour., 266, where the member had omitted to designate any beneficiary in the mode provided by the rules of the society, and proof was offered of a parol designation, not in conformity to those rules, the court said: "He was bound by the rules of the association, and could not change the beneficiary in a way not in conformity with them.

So in Stephenson v. Stephenson, 64 Iowa, 534, where the mode of changing the beneficiary was limited, as in the principal case, to a surrender of the certificate and the issue of a new one, an attempt of the member to change his beneficiaries by his last will was held to be inoperative and void.

In Highland v. Highland, 13 Braow. 510, 109 Ill., 374, a case which arose in the same Order of Knights of Honor, there was, as in the principal case, an imperfect and incomplete attempt to change beneficiary, which was disregarded because of a lack of compliance with the rules of the Order.

4. In these mutual benefit societies, the right of the member to continuous insurance depends upon continuous payments of assessments, as a condition precedent. Inasmuch as such payment is tantamount to the making of a new contract for insurance, it is competent for the society to impose upon the member new conditions to such new contract. It follows that amendments to the rules and regulations, adopted in due course by the society, enter into and become a part of the contract from and after their adoption. This principle has been variously applied by the courts; as to the mode of designating a beneficiary,in Durian v. Central Verein, 7 Daly, 168; to the change of beneficiary in Hellenberg v. I. O. B. B., 94 N. Y. 580; to a prohibition upon the payment of benefit in case a member dies by suicide, in Knights Golden Rule v. Ainsworth, 71 Ala. 436; to the mode of making proof of death, in Masonic Co. v. Gibson, 52 Ga. 640; and to the amount of sick benefits and the mode of applying for same, in St. Patrick's Society v. McVey, 92 Penn. St. 510; Kehlenbeck v. Logeman, 10 Daly, 447; Poultney v. Bachman, 31 Hun., 49.

Memphis, Tenn. J. O. PIERCE.

PROHIBITORY LAW — CONFISCATION — COMPENSATION.

STATE OF KANSAS, EX REL. V. JOHN WALRUFF, ET AL.

United States Circuit Court. District of Kansas.

The prohibitory amendment to the constitution of Kansas and the laws passed in pursuance thereof condemn and confiscate to public use all property then in use for the manufacture of the prohibited articles, and having failed to provide compensation therefor, are in violation of the fourteenth amendment to the constitution of the United States, as taking property without due process of law.

BREWER, J., delivered the opinion of the court:

The facts upon which the foundation question in this case rests are few and simple. Between 1870 and 1874 the defendants constructed a brewery in Lawrence, Kansas. The building,

machinery and fixtures were designed and adopted for the making of beer and nothing else. For such purpose they were worth $50,000; for any other purpose not to exceed $5,000. At the time of the erection of the building and up to 1880, the making of beer was as legal, as free from tax, license or other restriction, as the milling of flour. In that year a constitutional amendment was adopted, prohibiting the manufacture of beer except for medicinal, scientific and mechanical purposes. In 1881 and 1885 laws were enacted to carry this prohibition into effect. Under these laws a permit was essential for the manufacture for the excepted purposes. To the defendants this permit was refused. An injunction was thereupon sued out from the district court enjoining defendants absolutely from the manufacture of beer. Thus, in strict conformity to the laws of the State, the defendants are prohibited from using their property for the purposes for which alone it is designed, adapted and valuable, and are required without compensation to surrender $45,900 of value, which they had acquired under every solemn unlimited guaranty of protection to property which constitutional declaration, and the underlying thought of just and staple government could give.

The action in which this injunction was granted they now seek to remove to this court, and insist that, no matter what the State may think or do, the fourteenth amendment to the federal constitution does give protection—or at least that they are entitled to the opinion and judgment of the federal courts upon the question whether that portion of the fourteenth amendment which forbids a State to "deprive any person of life, liberty or property without due process of law," and "to deny to any person within its jurisdiction the equal protection of the law," is not violated by this action of the State as respects them.

It is idle to deny that the question here presented is one of difficulty and grave importance. On the one hand it is insisted. that both the amendment and the laws were duly and in compliance with established forms of procedure adopted and enacted; that the withholding of the permit was the act of a judicial officer in the exercise of a proper and granted discretion; that the injunction was issued out of the regular court of general original jurisdiction, and in an ordinary and familiar form of action; that thus there has been "due process of law," and that the amendment does not prohibit a State from depriving a person of his property, but only prohibits such deprivation "without due process of law." While on the other hand it is apparrent, that the defendants, having invested large properties in a perfectly legal business, are stripped of the value of such properties, and that not as the indirect and consequential result of legislative changes in the law, but by a direct prohibition upon the only use for which such properties are designed, adapted and valuable. Is a State potent through the form of law to take from a citizen, by direct action, the value of his property, without compensation?

As the judge of an inferior federal court, I turn naturally to the opinions of my superior, the Supreme Court of the United States, for information and guidance. In the case of Bartemyer v. Iowa, 18 Wall. 129, the opinion of the court was delivered by Justice Miller, and in it the court uses this language:

"But if it were true and it were fairly presented to us, that the defendant was the owner of the class of intoxicating liquor which he sold to Hickey at the time that the State of Iowa first imposed an absolute prohibition on the sale of such liquors, then we can see that two very grave questions would arise, namely: Whether this would be a statute depriving him of his property without due process of law; and secondly, whether, if it were so, it would be, so far as violation of the fourteenth amendment in that regard as would call for judicial action by this court."

In the same case, in a concurring opinion, Justice Bradley said:

"The law, therefore, was not an invasion of property existing at the date of its passage, and the question of depriving a person of property without due process of law does not arise. No one has ever doubted that a legislature may prohibit the vending of articles deemed injurious to the safety of society, provided it does not interfere with vested rights of property. When such rights stand in the way of the public good, they can be removed by awarding compensation to the owner."

And Justice Field adds these words:

"I have no doubt of the power of the State to regulate the sale of intoxicating liquors, when such regulation does not amount to the destruction of the right of property in them. The right of property in an article involves the power to sell and dispose of such articles as well as to use and enjoy it. Any act which declares that the owner shall neither sell it, nor dispose of it, nor use and enjoy it, confiscates it, depriving him of his property without due process of law. Against such arbitrary legislation by any State the fourteenth amendment affords protection."

In the subsequent case case of the Beer Company v. Massachusetts, 97 U. S. 25, the court thus refers to the matter:

"If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by an incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State. We do not mean to say that property actually in existence, and in which the right of the owner has become vested, may be taken for the public good without compensation, but we infer that the liquor in this

case, as in the case of Bartemyer v. Iowa, was not in existence when the liquor law of Massachusetts was passed."

In the light of this declaration of the Supreme Court, that when a man owns, with the unrestricted right to use or sell, a class of liquor, mere personal property, which without injury or depreciation in value can be carried outside the jurisdiction of the State, legislation of a State prohibiting its sale, and to that extent only diminishing its value, presents a grave question, under the fourteenth amendment; the further positive assertion of one of the justices that such legislation is void under that amendment; and a still further intimation of the court, in a later case, that vested rights of property cannot be destroyed for the public good compensation, it would seem a contemptuous disregard by a subordinate tribunal of the judgment of its superior, for me to hold that legislation of a State destroying the value by prohibiting the use of property which cannot be moved, and in whose use the owner had prior thereto an absolute and restricted title, is clearly not in conflict with that amendment, and presents absolutely no question for the cognizance and judgment of the Federal Tribunals.

But I am not content to leave this case upon these authoritative suggestions of the Supreme Court. As a new matter it is clear to me that there is Federal question giving right of removal; and here I assert these propositions: First, debarring a man by express prohibition from the use of his property for the sake of the public, is a taking of private property for public uses. It is the power to use, and not the mere title, which gives value to property. Give a man the fee simple to a flouring mill, coupled with an absolute prohibition on its use, and of what value is it to him? In the most common and ordinary cases of taking private property for public uses, the condemnation of the right-of-way for a railroad, the title is not divested. The owner still retains the fee simple, and he is only debarred from the use. When the railroad abandons the use he retakes it.

In the leading case of Pumpelly v. Green Bay Co., 13 Wall. 166, which was a case where land was overflowed in consequence of the erection of a dam, the Supreme Court thus disposes of the matter:

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators, as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction, without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private rights under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

In the case of Munn v. Illinois, 94 U. S. 141, Justice Field uses this language:

"All that is beneficial in property arises from its uses; and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. If the constitutional guaranty extends no further than to prevent a deprivation of title, and possession, and allows a deprivation of use, and the fruits of that use, it does not merit the encomiums it has received."

I meet here the common argument, that when private property is taken for public use, there is always a transfer of the use from one party to another, that here the use is not transferred, but only forbidden, and that this deprivation of the use is only one of the consequential injuries resulting from a change of policy on the part of the State, for which no compensation or redress is allowed. It is *damnum absque injuria*. The argument is not sound. As a matter of fact, in condemnation cases, seldom is the particular use to which the property has been put transferred. Almost always that use is destroyed, in order that another may be acquired. The farmer surrenders a part of his farm to the railroad company, not that the company may continue its use for farming purposes, but that the public may acquire the benefit in another direction; so where land is flowed by a mill dam. And thus it is generally. Here the use is taken away solely and directly for the benefit of the public. For no other reason and upon no other ground could it be disturbed. Of course in this as in other cases some use remains to the owner, but here, as elsewhere, the use which is of special value is taken from him for the benefit of the public. And this is not a consequential result. It is not that the profits of his manufacture are reduced by reason of a prohibition upon sales. The law speaks to him by direct command, and says, "Stop your manufacturing." It is idle to talk of consequential results and injuries, when the law in direct language forbids the use of the premises for a brewery.

I assert, secondly, that natural equity as well as constitutional guaranty forbids such a taking of private property for the public good without compensation. In the case of The State v. Mugler, 29 Kas. 252, this question was presented to the Supreme Court of Kansas, and as a member of that court I then expressed this opinion. I am aware that my brethren differed from me, and that the court held that the State Constitution carried no such proposition. In view of that decision, I shall have little to say in respect to the guaranties in the State Constitution. I may, however, be

permitted to say, and I do it with the highest respect for the members of that court, and with the utmost deference to its opinion and judgments, that in the light of the frequent discussions of the question since that decision, and the more I have reflected thereon, the more profoundly am I convinced that the guaranties of safety and protection to private property contained within our State Constitution, forbid that any man should thus be despoiled of that which gives value to his property for the sake of the public good, without first receiving compensation for that which is taken from him.

Turning to the opinions of other courts, I find strong endorsement of the proposition I have asserted. In the case of Lake View v. Rose Hill Cemetery Company, 79 Ill. 101, the court says:

"We are unwilling to concede the existence of an indefinable power, superior to the Constitution, that may be invoked whenever the legislature may deem that public exigency may require it, by which a party may be capriciously deprived of his property or its use, whether such property consists of franchises or tangible forms of property."

The Constitution, of New Jersey contains no such guaranty as ours, yet the Supreme Court of that State, in Sinnickson v. Johnson, 2 Harrison, 129, declares:

"That this power to take private property reaches back of all constitutional provision, and it seems to have been a settled principle of universal law, that the right to compensation is an incident to the exercise of that power; that the one is inseparably connected with the other; that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle."

The Constitution of New York was similarly deficient, and yet in Gardner v. Newburg, 2 Johns. Ch. 162, Chancellor Kent granted an injunction to prevent the trustees of Newburg from diverting the water of a certain stream flowing over plaintiff's land from its usual course, because the act of the legislature which authorized it, had made no provision for compensating the plaintiff for the injury thus done to his land. After citing several continental jurists on this right of eminent domain, he says that while they admit that private property may be taken for public uses, when public necessity or utility requires, they all lay it down as a clear principle of natural equity, that the individual whose property is thus sacrificed must be indemnified. And he adds that the principles and practice of the English government are equally explicit on this point. Were similar action taken by the State in respect to other industries, I can but think the vigor of constitutional guaranties would seem clearer. In my own city is a large manufacturing establishment, in which hundreds of thousands of dollars have been invested for the making of glucose. This is an inferior kind of sugar, and in the opinion of some a deleterious article. Yet the industry is legal—the manufacture not forbidden. Suppose the next legislature should believe that glucose was injurious to the public health, and forbid its manufacture. Could the wheels of that manufactory be stayed, and the value of that investment be destroyed, without compensation? Take also the illustration of playing cards, which by reason of their use for gambling purposes are, in the judgment of many good people, a bane to society. If a factory for their manufacture was established when, as now, a perfectly legal industry, would the owner hold his investment subject to the opinions of perhaps a temporary majority?

Or take a still stronger illustration: This is a corn-growing State, yet wheat also is raised abundantly, and many flour mills exist. Suppose the legislature should determine that the best interests of the State would be promoted by stopping the growing of wheat and increasing the crop of corn, and to that end should prohibit the milling of flour. Must the owners, without compensation, abandon their milling and sacrifice their investment? Does not natural justice, as well as constitutional guaranty, compel compensation as a condition to such sacrifice? Yet, who can state what the law will recognize as a legal distinction between those cases and what the law will recognize as a legal distinction between those cases and this. Of course, it will be said that no legislature would ever think of such extreme and unreasonable action. But the question for courts to determine is not what is likely to be done, but what can be done.

Thirdly, I affirm that no matter what legislative enactments may be had, what forms of procedure, judicial or otherwise, may be proscribed, there is not "due process of law" if the plain purpose and inevitable result is the spoilation of private property for the benefit of the public without compensation. It is a mistake to say that the forms of law alone constitute "due process." No complete and perfect definition of the phrase "due process of law" has yet been given. The most familiar, and one for ordinary cases sufficiently accurate, is that given by Daniel Webster in the celebrated Dartmouth College Case, the "law of the land" being substantially equivalent to "due process of law," as follows: "By the law of the land is meant the general law, which hears before it condemns, which proceeds upon inquiry, and renders judgment only upon trial."

But as said by Mr. Justice Miller, in Davidson v. New Orleans, 96 U. S. 104, it is probably better "to leave the meaning to be evolved by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded."

In the same case Mr. Justice Bradley adds these words:

"In judging what is 'due process of law,' respect must be had to the cause and object of the

taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law.' "

In Murray's Lessee v. Hoboken L. & I. Co., 18 How. 226, the Supreme Court thus limits the meaning of the phrase:

"The constitution contains no description of these processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative, as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will."

Now, in the case at bar, while judicial proceedings are prescribed, yet the spoilation is the direct command of the legislature, and the judicial proceedings are only the machinery to execute the command. No discretion is left to the courts. The legislature has in terms said to defendants, "Stop your use of your brewery," and has directed the courts to enforce that command. There is nothing but mere machinery between the legislative edict and an unused, valueless manufactury. As well might the executive as the courts be charged with the enforcement of this command. Such a command, no matter how enforced, operating to deprive the citizen of the value of his property without compensation, is, in the language of Mr. Justice Bradley, *supra*, "arbitrary, oppressive and unjust," and therefore should be "declared to be not due process of law."

Fourthly, and as a necessary consequence of the preceding legislation which operates upon the defendants as does this, is in conflict with the fourteenth amendment, and as to them void. At least it presents a question arising under such amendment as to which they are entitled to the opinion and judgment of the Federal courts; as the amount in controversy is unquestionably in excess of five hundred dollars, the case is a removable one. In view of what has hitherto fallen from my pen in other cases, it may be unnecessary to add anything further; yet to guard against any possible misapprehension, as well as to indicate that my views, as expressed upon other questions, have not changed, let me say that I do not in the least question the power of the State to absolutely prohibit the manufacture of beer, or doubt that such prohibition is potential as against any one proposing in the future to engage in such manufacture. Any one thus engaging does so at his peril, and cannot evoke the protection of the fourteenth amendment, or demand the consideration and judgment of the Federal courts. All that I hold is, that property within the meaning of that amendment includes both the title and the right to use; that when the right to use in a given way is vested in a citizen, it cannot be taken from him for the public good without compensation. Beyond any doubt the State can prohibit defendants from continuing their business of brewing, but, before it can do so, it must pay the value of the property destroyed.

Nothing that I have said in this opinion, is to be taken as bearing on the question of the sale of beer or the power of the State over that. Counsel claimed that the right to manufacture without the right to sell was a barren right. Whatever limitations may exist in this State, the markets of the world are open, and with such markets the right to manufacture is far from a barren right.

Other questions were discussed by counsel at great length, and with great ability. I have not noticed them in this opinion, already quite lengthy, because this question is in the case, cannot be ignored, and justifies a removal.

The motion to remand will be overruled.

One thing more I may be excused for referring to. In the course of the various arguments that have been made to me in this State and the sister State of Iowa, on the question of removals to the Federal courts of proceedings to enforce their prohibitory laws, it has more than once been intimated that jurisdiction in the Federal courts of such proceedings, meant the nullification of those laws. There could be no greater mistake. The judges of these courts are citizens of these States, as interested as any citizens in the good name of their States, the enforcement of their laws, and the sobriety of their citizens. Experience has shown that those courts enforce laws as strictly as any, are as little disposed to tolerate trifling or evasion of their orders, and generally with a severer hand. If it should so happen that by the judgment of the Supreme Court of the United States, the ultimate tribunal in this nation, it should be determined that in this or any kindred case the zeal for temperance of the good people of this State has led them to infringe upon sacred and protected rights of property, I cannot doubt that they will gladly hasten to make the compensation which shall be found just. Indeed, it is a truth ever to be borne in mind, and never more so than in times of deep feeling and determined effort, that they who are striving to lift society up to the plane of a higher and purer life should see to it, that every act and every step is attended by absolute justice. I commend this to the thoughtful consideration and judgment of the good people of my State—a State in whose past I glory and in whose future I believe.

NOTE.—This case is one of unusual interest; and if sustained, the rule of the decision is a great impediment to the so-called prohibition laws. Not until the ratification of the Fourteenth Amendment to the Federal Constitution (declared by the Secretary of State to be in force July 28, 1868), could the validity of the

Prohibition Laws of the several States be tested; but, strange as it may seem, for nearly eighteen years that Amendment has been in force the question involved in this case has not been fairly presented to the Supreme Court of the United States. That amendment has been the cause of controverted questions in constitutional law, ever since it became a part of the Constitution. The clause under consideration in the principal case was that which forbids any State depriving "any person of life, liberty, or property, without due process of law."

This and similar phrases can be found in almost every State Constitution; and they all mean substantially the same thing. Cooley Const. Lim., 351. Previous to the adoption of this amendment a like clause had been inserted in the Constitution, but this related only to the Federal Government and laws, and not to the States. Cary v. Carter, 48 Ind. 327; Westervelt v. Gregg, 12 N. Y. 209. The multitude of decisions arising over the true interpretation of these clauses are fairly bewildering; and to review them here in full, or even give a partial review of them would increase this note beyond the limits assigned to it. Whatever contrariety of opinion may have previously existed in the State courts as to the meaning of the phrase "due course of law," and as to its application, that is being gradually settled by the decisions of the Federal Supreme Court.

Judge Brewer holds that the Kansas Constitution and laws have the effect: First, to debar the defendant from the use of their property for the sake of the public, and its taking of private property for public purposes; Second, that natural equity as well as constitutional guaranty forbids such a taking of private property for the public good without compensation; Third, If it is the plain purpose and inevitable result of legislative enactments or prescribed forms of procedure, judicial or otherwise, to despoil private property for the benefit of the public without compensation, it is not "due process of law."

If the writer may be permitted to express an opinion, it is difficult to see how any other conclusion could be reached than the one arrived at by the court. He is certainly well backed by the judicial utterances of the Supreme Court; and, although they may be deemed but mere *dicta*, they cast their shadows before them, full of warnings to the prohibitionists.

The case of Bartemeyer v. Iowa, 18 Wall, 129; s. c., 13 Amer. L. Reg. 220, was decided in 1874. Bartemeyer, in a prosecution before a justice of the peace, was prosecuted for selling a glass of intoxicating liquor when the law prohibited such sale. He pleaded in bar that he "was the lawful owner, holder and possessor, in the State of Iowa," of the liquor "prior to the day on which the law was passed under which these proceedings are instituted and prosecuted, known as the act for the suppression of intemperance, and being chapter sixty-four of the revision of 1860; and that, prior to the passage of said act for the suppression of intemperance, he was a citizen of the United States and of the State of Iowa."

On appeal to the Iowa Supreme Court, State v. Bartemeyer, 31 Iowa, 601, that court held that so far as the general idea was involved, that acts for suppressing the use of intoxicating drinks were opposed to the Constitution of the United States, it was not true, and cite Our House No. 2 v. State, 4 Greene, 171; Zunhof v. State, 4 Greene, 526; Santos v. State, 2 Ia. 165. Referring to the allegations in the plea that the defendant was the owner of the liquor before the passage of the act under which he was prosecuted, the court held that the transcript failed to show that the admissions and averments of the plea were all the evidence in the case, and that other evidence may have shown that he did not so own and possess the liquor.

After stating that the question of regulating or prohibiting the sale of intoxicating liquors before the passage of the Fourteenth Amendment was "considered as falling within the police regulations of the State, left to their judgment, and subject to no other limitations than such as were imposed by the State Constitutions, or by the general principles supposed to limit all legislative power," the Supreme Court of the United States held the plea bad, because it was only an argumentative statement that the liquor was owned before the passage of the prohibitory law, and justified itself in being thus technical on the ground that the case had all the evidences of being a moot case designed to obtain a decision of the question sought to be raised.

The defendant claimed that the act violated those clauses of the Amendment which forbid a State to pass any less violating or abridging the privileges and immunities of citizens of the United States, and that it deprived him of his property without due process of law. To this the court said: "As regards both branches of this defense, it is to be observed that the statute of Iowa, which is complained of, was in existence long before the amendment of the Federal Constitution, which is thus invoked to render it invalid. Whatever were the privileges of Mr. Bartemeyer, as they stood before that amendment, under the Iowa statute, they have certainly not been abridged by any action of the State legislature since that amendment become a part of the Constitution. And unless that amendment confers privileges and immunities which he did not previously possess, the argument fails. But the most liberal advocate of the rights conferred by that amendment have contended for nothing more than that the rights of citizens previously existing, and dependent wholly on State laws for their recognition, are now placed under the protection of the Federal Government, and are secured by the Federal Constitution. The weight of authority is overwhelming that no such immunity has heretofore existed as would prevent State legislatures from regulating and even prohibiting the traffic in intoxicating drinks, with a solitary exception. That exception is the case of a law operating so rigidly on property in existence at the time of its passage, absolutely prohibiting its sale, as to amount to depriving the owner of his property. A single case, that of Wynehomer v. The People, 3 Kernan, 486, has held that as to such property the statute would be void for that reason. But no case has held that such a law was void as violating the privileges or immunities of citizens of a State or of the United States. If, however, such a proposition is seriously urged, we think that the right to sell intoxicating liquors, so far as such a right exists, is not one of the rights growing out of citizenship of the United States, and in this regard the case falls within the principles laid down by this court in The Slaughter House Cases, 16 Wallace."

Judge Bradley, while concurring in the opinion of the court, distinguished the case from the Slaughter-House Cases.

In Beer Co. v. Massachusetts, 97 U. S. 25, the facts were as follows: The company was chartered by the legislature in 1828, to be governed by a law of 1809, which reserved the right to amend all charters, or to unconditionally repeal them, of companies formed under it. This act was repealed by an act of 1829, covering the same ground and the legislature also reserved the right to amend or repeal it. An act of 1869 prohibited the manufacture and sale of intoxicating liquors, and as the company had engaged in that business since 1828, it claimed this law to be unconstitutional. But the Supreme Court held that it was not objectionable, because the right to repeal the law under which the

company was formed was reserved by the legislature. It was said in the opinion that "The plaintiff in error was incorporated 'for the purpose of manufacturing malt liquors in all varieties,' it is true; and the right to manufacture, undoubtedly, as the plaintiff's counsel contends, included the incidental right to dispose of the liquor manufactured. But although this right or capacity was thus granted in the most unqualified form, it cannot be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquor; nor as exempting the corporation from any control therein to which a citizen would be subject, if the interests of the community should require it. If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individual or corporations may suffer. All rights are held subject to the police power of the State."

To the claim that the legislature had conferred upon the company an unrepealable right to manufacture and sell liquors, the courts answered that "The legislature had no power to confer any such rights."

It is very clear, therefore, that the case did not present the point raised in the principal case.

The celebrated License Cases, 5 How. 504, involved liquor questions in a certain way. Three appeals and cases were involved; one from Massachusetts, one from Rhode Island and one from New Hampshire. They were passed upon in 1846. No opinion of the court was delivered, but each judge delivered his own. The three cases were affirmed. The Massachusetts and Rhode Island cases were alike. In them Chief Justice Taney held, following Brown v. Maryland, 12 Wheat. 419, that where liquor was imported into a State, and the original packages were broken, the State had a right to require a license from the vendor of the broken packages. In this Justices McLean, Catron and Nelson concurred. The other judges joined in affirming the cases substantially on the ground that the laws were not an interference with foreign commerce, and covered a field, under the police power, over which the legislatures had exclusive control.

The New Hampshire case was different from the other two. A State law forbade the sale of all intoxicating liquors. The gin in question was brought from Massachusetts and never broken in bulk. The law prohibited its sale and required its seizure. Taney held the law valid because it only affected commerce between the State, and as Congress had passed no law covering that field, the legislature had the right to regulate such commerce.

The statute passed upon in Wynehamer v. People, 13 N. Y. 378 (s. c., 20 Barb. 567, affirmed), was one of unusual severity. An act of the legislature provided that any one selling or offering to sell, or having in his possession with intent to sell or give away, any intoxicating liquor should be fined on conviction and the liquors forfeited, unless licensed to sell, which license restricted sales made for mechanical, medicinal, medical purposes, or wine for sacramental purposes.

Any officer had the right to seize the liquor so illegally offered or kept for sale, or with intent to give it away, and arrest the offender. On conviction the liquor was destroyed and the vessels containing it sold to pay costs. The owner of the liquor by express provisions was debarred bringing any suit for its conversion. Wynehomer owned liquor at the time of the enactment of the statute and when it went into force. It was held that the statute destroyed the property in those intoxicating liquors owned by him previous to its passage; and as to them it violated the State constitutional provision declaring that no person should be deprived of life, liberty or property, without due process of law. It was further held that as no discrimination was made between liquors held at the time of its passage and those acquired afterwards, the whole act was void; although, seemingly, if limited to the after-acquired liquors the law would be valid. The cases were decided by a divided court, and the opinions delivered cover over a hundred pages.

See also People v. Toynbee, 20 Barb. 168, affirmed with the case of Wynehomer v. People, 18 N. Y. 378. This case was referred to when the court held that the legislature had the power to create a cause of action for damages in favor of a person injured in body or property by the act of an intoxicated person against the owner of real property, whose only connection with the injury was that he leased the premises where the liquor causing the intoxication was sold or given away, with knowledge that intoxicating liquors were to be sold thereon. Bertholf v. O'Reilly, 74 N. Y. 509.

The case of Herman v. State, 8 Ind. 545; s. c. 4 Amer. L. Reg. (O. S.) 344, involved the question under discussion. A statute of Indiana forbade the manufacture, sale, or keeping for sale any intoxicating liquor, and allowed the appointment of an agent in each county to sell for medical, mechanical and sacramental purposes. This agent furnished the money necessary to run his agency and was reimbursed, with interest, from the county funds. The law was in fact absolutely prohibitory. Liquors in bulk were admitted into the State and in that condition could be sold, if sold in the original packages. The judge first decided that the act was unconstitutional because it involved the county in private business, saying that "The government cannot turn druggist and become the sole dealer in medicine in the State." He relied upon the statement of Say in his Political Economy, note to page 134, that "A government is guilty of an invasion upon the faculties of industry possessed by individuals, when it appropriates to itself a particular branch of industry, the business of exchange and brokerage for example; or when it sells the exclusive privilege of conducting it."

The judge further proceeded, however, and held the law void upon the ground that it was an unusual restraint upon the liberties of the people, and one that the legislature could not enact.

Of this case it is well to call the attention of the profession to the fact, that while a judge of the highest Appellate Court of Indiana, it was delivered at Chamber and was the opinion only of one judge. Yet at about the same time was delivered the opinion in Beebe v. State, 6 Ind. 501, in which the entire court joined, holding the same statute unconstitutional. This case was followed in a number of cases in that State, but a subsequent act rendered its citation unnecessary.

In State *ex rel* Sandford v. Morris, Common Pleas, 12 Amer. L. Reg. 32; s. c. 36 N. J. L. 72; 13 Amer. Rep. 422, while passing on a local option law, the court takes occasion to decide and say, "If, therefore, the legislature shall consider the retail of ardent spirits injurious to citizens or productive of idleness and vice, it may provide for its total suppression. Such inhibition is justified only as a police regulation, and its legality has been recognized in well-considered cases." See Fell v. State, 42 Md. 71; s. c. 20 Am. Rep. 83.

A statute, however, declaring all intoxicating liquors within the State to be a nuisance and authorizing an officer to seize and destroy them without their condemnation before a court empowered to investigate and give a hearing of the matter, after notice to the owner, is not valid. Fisher v. McGirr, 2 Amer. L. Reg. 460; s. c.

In Rhode Island a statute was passed prohibiting the manufacturing or keeping for sale of intoxicating liquors within the State. By the terms, the statute applied to liquors then on hand and rendered them practically worthless. So far as it prohibited sales and the keeping of liquors for sale, it was deemed prospective; and its lessening the value of liquors on hand previous to its passage, was deemed not to act retroactively in the sense of an *ex part facto* law. State v. Paul, 5 R. I. 185; State, 5 R. I. 497.

That statutes prohibiting entirely sales of intoxicating liquors are valid: See State v. Wheeler, 25 Conn. 290; Reynolds v. Geary, 26 Conn. 179; Oviatt v. Pond, 29 Conn. 479; State v. Brennan, 25 Conn. 278; Perdue v. Ellis, 18 Geo. 586; Gutzweller v. People, 14 Ill. 142; Jones v. People, 14 Ill. 196; Austin v. State, 10 Mo. 591; State v. Learcy, 20 Mo. 489; Our Home No. 2. v. State, 4 Gr. (Ia.) 172; Zumhoff v. State, 4 Gr. (Ia.) 526; Santo v. State, 2 Iowa 165; State v. Carney, 20 Iowa, 82; State v. Baugham, 20 Iowa, 497; Lunt's Case, 6 Greenl. 412; State v. Miller, 48 Me. 576; State v. Gurney. 37 Me. 156; People v. Howley, 3 Mich. 330; People v. Gallagher, 4 Mich. 244; People v. Quant, 2 Park. 410; Markle v. Akron, 14 Ohio 586; Lincoln v. Smith, 27 Vt. 328; *in re* Dougherty, 27 Vt. 325; State v. Conlin, 27 Vt. 318; Gill v. Barker, 31 Vt. 610; Intoxicating Liquors, 25 Kan. 751; s. c. 37 Amer. Rep. 284; State v. Mugler, 29 Kan. 252; s. c. 44 Amer. Rep. 634; Robinson v. State, 38 Ark. 641; Waller v. State, 38 Ark. 656.

So a law prohibiting sales within a certain distance of a school, university, church or the like, is valid. Parkinson v. State, 14 Md. 184; State v. Muse, 4 D. & B. (N. C.) L. 319; Fetter v. Wilt, 46 Pa. St. 457; *Ex parte* McClain 61 Cal. 436; s. c., 44 Am. Rep. 554; State v. Joyner, 81 N. C. 534; Black v. State, 66 Ala. 493; Tillery v. State, 10 Lea 35.

So the State may prohibit its sale on certain days, or on certain hours. Hall v. State, 3 Ga. 18; Megowan v. Com. 2 Met. (K.) 3; Frasier v. State, 5 Mo. 526; Lamber v. State, 8 Mo. 492; Hederick v. State, 101 Ind. 564; s. c. 51 Am. Rep. 768.

The so-called local option laws have frequently been upheld. People v. City of Bute, 4 Mont. 179; s. c. 47 Am. Rep. 346; State v. Cook, 24 Minn. 247; s. c. 31 Amer. Rep. 344; Boyd v. Bryant, 35 Ark. 69; s. c. 37 Amer. Rep. 6; State v. Parker, 27 Vt. 357; Locke's Appeal, 72 Pa. St. 491; s. c. 13 Amer. Rep. 716; State v. Noyes, 10 Fort. (N. H.) 279; State v. Court of Common Pleas, 36 N. J. L. 72; s. c. 13 Amer. Rep. 422; 12 Amer. L. Reg. 32; Com. v. Bennett, 108 Mass. 27; Com. v. Dean, 110 Mass. 357; Com. v. Weller, 14 Bush 218; s. c. 29 Amer. Rep. 407; Anderson v. Com., 13 Bush. —; Fell v. State, 42 Md. 71; s. c. 20 Amer. Rep. 83; State v. Wilcox 42 Conn. 364; s. c. 19 Amer. Rep. 563.

Contra, Rice v. Foster, 4 Harr. (Del.) 479; State v. Weir, 33 Ia. 134; s. c. 11 Amer. Rep. 115; *ex parte* Wall, 10 Alb. L. Jr. 284; s. c. 48 Cal. 279; 17 Amer. Rep. 425; Maize v. State, 4 Ind. 342.

There is no vested right in a license granted under a statute providing for its revocation. La Croix v. County Commissioners, 50 Conn. 321; s. c. 47 Amer. Rep. 648; Calder v. Kurby, 5 Gray, 597; State v. Holmes, 38 N. H. 225; People v. Wright, 3 Hun. 306; People v. Board, etc., 59 N. Y. 92; Com. v. Maylan, 119 Mass. 109; Com v. Hamer, 128 Mass. 76; Columbus City v. Cutcomp, 61 Iowa, 672; Richland Co. v. Richland Center, 29 Alb. L. Jr. 412.

Thus where a merchant had purchased guns and pistols with a view to sell them, and at the time he purchased them he had a license to vend such articles; and after that license expired the legislature repealed that part of the act requiring a license, thus rendering a sale of them prohibitory, he was held criminally liable for having offered to sell the remainder left at the time his license expired. State v. Burgoyne, 7 Lea, 173; s. c. 40 Am. Rep. 60. - 25 FdR 865

And there are many authorities, even some of those just cited, which hold that power to revoke the license, is a tacit condition of every license and it is not necessary to be reserved in the law as license. McKinney v. Town of Salem, 77 Ind. 217.

So the State may prohibit a certain class of persons selling intoxicating liquors, by requiring every vendor to take out a license, and, as a qualification to receiving a license, requiring the applicant to be a person of good moral character. *In re* Ruth, 10 Amer. L. Reg. 767; s. c. 32 Iowa 250; Calder v. Sheppard, 61 Ind. 219.

But a State statute which imposes a tax for selling spiritous, or vinous, malt or other intoxicating liquors, and providing that it shall not apply to wine or beer manufactured in the State, is unconstitutional, so far as it makes a discrimination against wine and beer imported from other States; but on this ground the vendor cannot avoid the payment of the tax, if, in addition to such wine and beer, he sells other intoxicating quors within the terms of the statute. Tiernon v. Rinker, 102 U. S. 123; State v. March, 37 Ark. 356; McCreary v. State, 73 Ala. 480; *contra* State v. Stuck, 12 N. W. Rep. 483; s. c. 58 Iowa 496.

The imposition of a tax upon the business of selling intoxicating liquors supplied from manufacturers out of the State is not a license, and is not a violation of the Federal Constitution as an unjust discrimination against the citizens of another State. It is also only commerce between the States. People v. Walling, 18 N. W. Rep. 807; s. c. 18 Rep. 149. See State v. Amery, 12 R. I. 64.

W. W. THORNTON.

Crawfordsville, Ind.

WEEKLY DIGEST OF RECENT CASES.

1. ATTORNEY, WHEN HELD AS TRUSTEE—*Administrator Must Assert Estate's Right in Reasonable Time.*—1. Where an attorney of an estate buys in land, sold to satisfy a debt due the estate; the administrator has the option to take the land or hold the attorney as trustee, although he was not directed by the administrator to buy the land and took the deed in his own name. 3rd Grant, Pa., 65; 11 Johns. N. Y., 467. 2. The administrator must exercise his right in a reasonable time. He cannot dally with the attorney for years, until the land has appreciated in value; and then assert a right for the estate. 67 Mo., 181; 56 Miss., 541; 11 Ohio, 57. *Ward v. Brown*, S. C. Mo., January 26, 1886.

2. BENEFICIAL ASSOCIATION—*Construction of By-Laws—Corporations—Must Act Through Officers.*—Where a corporation, organized for the purpose of mutual benefit, provided in its by-laws that upon the death of a member, in order to make up a sum to be paid over to the decedent's nominee,

each member shall pay one dollar, and that, at the death of a member who has regularly paid such assessments, his nominee shall be entitled to claim and receive from the association the amount collected on such an assessment levied therefor, the nominee of the decedent is entitled to receive only such sum as was actually collected from the members upon the assessment made for her benefit, and not as many dollars as there were members of the association at the time of the decendent's death. A resolution of the members of a corporation concerning the disbursement of money, if not adopted or ratified by the directors, (where no money could be appropriated or drawn from the treasury without their order), is ineffective, as a corporation can only act or speak through the meium prescribed by law, and that is its board of trustees. *In re Solidarite, etc. Co.*, S. C. Cal. January 27, 1886, Pac. Rep.

3. BONA FIDE PURCHASER, NOT AFFECTED BY PRIOR FRAUDULENT CONVEYANCE—*May Perfect Title*—1. A *bona fide* purchaser for a valuable consideration from a fraudulent grantee is not affected by the fraud in the former conveyance. 5 Mo., 296; 12 Mo., 169; Bump Fraud Con. 3rd ed., p. 493; Story Eq. Jur. § 434. 2. A purchaser with notice of the fraud may protect himself by purchasing the title of a *bona fide* purchaser for a valuable consideration without notice. So too, a purchaser without notice of the fraud may sell property to one who has notice and pass a good title. 69 Ind. 148; 97 Penn. St. 287; 78 Mo. 449. *Craig v. Zimmermann*, S. C. Mo. January 26, 1886.

4. CONSTITUTIONAL LAW—*Right of Appeal—Rules of Court*—The right of appeal is a constitutional right, and inferior appellate courts have no power to defeat or destroy such right for failure to comply with conditions imposed by their own rules, but not sanctioned by any provision of law. *Levy v. Judges of Appeal, etc.*, S. C. Louisiana, 1885. The Reporter.

5. CONTRACT. [*Contractor—Compensation.*] *Entitled to Compensation for Work Done and materials in a Building Destroyed by Accidental Fire.*—An incorporated firm of builders made a contract with a corporation, owning a church edifice, to furnish the materials, make, and put in the building by a stated date, certain fixtures. Slight alterations were made in the work, by agreement, after the contract was entered into. After the date agreed on, but before the entire completion of the work and its acceptance by the building committee, the building was accidentally destroyed by fire without the fault of either party. *Held*, that the contractor is entitled to recover for work done and materials in the building at the time of the fire. In the opinion of the court by Black, J., it is said: "Besides the fact that the work was in progress after the date fixed by the contract for its completion, it also appears that the parties agreed to certain alterations in the work to be done. It does not appear whether the time for completing the work was extended by agreement or acquiesence. Neither the extension of the time nor the agreed changes affected the contract in its other provisions. In all other respects it remained in full force. The contractor cannot simply because of the delay and the alterations abandon his contract and sue for the value of the work. Adams v. Nichols, 19 Pick. 275. The contractor relies for recovery upon an alleged acceptance and cites, Lord v. Wheeler, 1 Gray 282. The facts of that case are not analogous to this. There when the work was done the employer entered into and occupied the house and used and enjoyed the material and labor of the contractor. This use and enjoyment was held to be a severance of the contract and an acceptance *pro tanto*. Here there is no pretense that the edifice was used for any purpose other than construction and this use was contemplated by the contract. The contract also determines how and by whom the acceptance shall be made. The duty to pass upon the work did not arise until completion. There is then, no ground upon which to base the claim that the work or any part of it had been accepted. Where a contractor agrees to build a house on the land of another, and before its completion and without his fault the house is destroyed by fire he is not thereby relieved from his obligation. The obligation to build is his own voluntary contract, and its nonperformance is not excused by inevitable accident. Adams v. Nichols, *supra*; Thompson v. Dudley, 25 N. Y. 272; School Dist. v. Dutchy, 25 Conn. 530; School Trustees v. Bennett, 3 Dutcher 515; Dermott v. Jones, 2 Wall. 1. In each of these cases the contract was to build a house entire, and it is apparent that they are unlike the contract in question here. There are two lines of authorities having a direct bearing upon the question in hand. * * * * The first lays down this rule: that the contractor who has furnished material and done work cannot recover if the building is destroyed before the completion of the work under the contract. 2 Add. Con. (Morgan's Ed.) p. 554; Appleby v. Meyer, L. R. 2 C. P. 650; Brunby v. Smith, 3 Ala. N. S. 123. The second line of authorities announces exactly the contrary doctrine, among them may be cited: Dallis v. Chapman, 36 Tex. 1; Clary v. Sohier, 120 Mass. 210; Cook *et al.* v. McCable, 53 Wis. 250; Rawson v. Clark, 70 Ill. 656. * * * * In the case at bar the fixtures were, it is true, to be put in place, and completed to the satisfaction of the building committee, and to be paid for only when completed; but the contract is based on the assumption that the employer would have the edifice erected and ready to receive the work. All this was a condition precedent to the performance of the contract by the contractor. The implied contract on the part of the employer was to have and keep the building ready to receive the fixtures and keep them therein for such length of time as would reasonably be required to put them in place. The agreement to do this is as much a part of the contract as if expressed therein in terms. This the employes failed to do. Besides this, the house was in the possession, control, care and custody of the employer, and the contractor had nothing to do with its protection further than to be without fault as to his work. The contract therefore was not an absolute one to do the work at all hazards, but it was dependant upon the assumed and implied conditions before stated—conditions which the employer was to perform and which it did not perform. Therefore, according to the weight of American authorties, such a contract is severable to the extent that the contractor may recover for work done up to the time of the fire. In this case the recovery should include the fixtures on the floor as well as those in place. *Hayes, Spencer & Co. v. Second Baptist Church*, S. C. Mo., Mch. 1st, 1886. MS.

6. HABEAS CORPUS—*Extradition—For what an Extradited Person May be Tried—Criminal Law—Forgery—Joinder of Offenses*—When two or more

distinct offenses are joined in one indictment, under § 1024 of the Revised Statutes, or two or more indictments therefor are consolidated, the jury may find the defendant guilty of one charge and not of another, and may find a verdict as to one or more of the charges, and be discharged from the consideration of the remainder, on which the defendant may be thereafter tried as if a jury had not been impaneled in the case: and the defendant may oe sentenced to receive the maximum punishment for each offense or charge of which the jury may find him guilty. A warrant of extradition allowed by the Dominion government under the tenth article of the treaty of 1842 with Great Britain, recited that the party was accused of the crime of "forgery" and had been committed for extradition thereon, without saying what forgery: *Held*, that resort might be had to the proceedings before the committing magistrate, and his report on which the warrant issued, to ascertain what and how many forgeries the extradition was intended to apply to, or include. The treaty aforesaid is not only a contract between the governments of Great Britain and the United States, but it is also the law of this land; and a person extradited under it cannot be detained or tried here for a crime, unless enumerated therein and included in the warrant of extradition; and he may, if occasion require, invoke the treaty in any judicial proceeding as a protection against such detention or trial. The postmaster at Lewiston, Idaho, issued a postal money-order on the application of a fictitious person, without consideration therefor, payable to a certain bank, to which he at the same time wrote in the name of such person, directing that the amount of the order be collected, and remitted to him at Pierce City, in a registered package, which he intercepted as it passed through his office and converted the contents to his own use: *Held*, that the act of the postmaster constituted forgery, both at common law and under the statute of the United States: R. S., § 5463. *Ex parte, Hibbs*, U. S. Circuit Court for Oregon, Feb. 4, 1886. West Coast Rep., Vol. 9, No. 4.

7. LIBEL—*Action by Partnership—Damages—Mental Suffering—Words Actionable Per Se—Truth of Charge, How Pleaded*—In an action for libel, brought by a partnership, damages can only be recovered for injury sustained in the joint business of the firm, and evidence to show the mental pain and distress of each of the plaintiffs is not admissible. A circular setting out a transaction by a firm, and alleging that "they are not worthy of support," and charging them with "base treachery" and "foul and nnfair dealings," is not actionable *per se*. If such circular, though not actionable *per se*, shows on its face that it was instigated by actual malice, the defendant must specially plead the truth of the charges, if he desires to take advantage of it either for justification or in mitigation of damages. *Donoghue v. Coffey*, S. C. Conn., January 1886. Atlantic Reporter.

8. MASTER AND SERVANT—*Employees of Different Masters — "Fellow-Servants."* — The defendant owned a saw-mill, and gave an order to D. & W., master machinists, to make some alterations in the gearing of the water-wheel of his mill. D. & W. sent the plaintiff and another workman to do the work. It was understood between these workmen and the defendant that the mill would run at such times as they were not actually at work upon the wheel. While they were at work upon the wheel the engineer of the defendant negligently started the wheel, injuring the plaintiff. *Held*, that plaintiff was a servant of the defendant, engaged in a common employment with the engineer. *Evan v. Lippincott*, S. Ct. N. Y., June, 1885.—*Ex.*

9. PARTNERSHIP—*Loan — Obligation Signed by Members Individually.*—Where money is obtained for and applied to the benefit of the firm, and subsequently is secured by notes and a mortgage executed by members of the firm, though the firm name is not used, the transaction is, in substance, a partnership transaction, the partners superadding to their joint obligation the several liability of each. *Carson v. Byers*, S. C. Iowa, December, 1885, The Reporter.

10. RAILROAD CORPORATION—*Action for Damages for Death of a Wounded Prisoner.*—Where a prisoner who is disabled by gunshot wounds made by an officer in effecting his capture, is put on and taken off of a railroad train by the officer, and his death subsequently results from the wounds, and it is shown that his removal by rail hastened his death, the company is not liable. *Johnson v. St. L. I. M. & S. Ry. Co.*, S. C. Mo., Dec. 21, 1885.

11. STATUTE OF FRAUDS—*Promise to Answer for Debt of Another*—The mother of A. was taken sick. A physician was called, who began to treat her. Upon his second visit she became dissatisfied, and desired another physician. A. instructed the physician to pay no attention to the complaints of his mother, but to continue the treatment, and he would pay him for his services; whereupon the physician continued to treat her. *Held*, that the promise was not to answer for the debt of another, but was an original undertaking, and not within the statute of frauds. *De Witt v. Root*, S. C. Neb. January 6, 1886. N. W. Rep.

12. WILL. [*Capital and Income.*]—*Apportionment of Contingent Reversionary Interest between Life-Tenant and Remainderman.*—Testator by his will gave his residuary personal estate, which included a contingent reversionary interest, to one for life, with remainders over. At the testator's death, and for some years afterwards, this reversionary interest was of no value, owing to the possible interests which might take effect in priority to it. It had now become practically a vested interest, subject only to the life interest of a person seventy-five years old, and was of considerable value. The question was raised as to how, supposing the reversion had been now sold, the proceeds of such sale ought to be apportioned between the tenant for life and remaindermen. *Held*, that this interest must now be treated as vested, and the apportionment must be made on the principle laid down in *Re* Earl of Chesterfield's Trusts (49 L. T. Rep. N. S. 261; 24 Ch. Div. 640) and Beavan v. Beavan (49 L. T. Rep. N. S. 263; 24 Ch. Div. 649), *i. e.*, by ascertaining what sum would, with accumulations of compound interest at four per cent. from the testator's death, less income tax, have produced the sum now realized, and that sum must be treated as capital and the remainder as income. *Re Horson*, Eng. Ch. Div., Oct. 27, 1885; 53 Law Times Rep. (N. S.) 627.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

31. A. traded a team of horses to B., who is totally insolvent, for a piece of real estate, B. giving a warranty deed to the premises and also representing to A. that the premises were free from incumbrances. After receiving the deed, A. learns that B. had no title to the property, and within three days after the trade is made, replevies the horses from B., before a justice of the peace. Can this action be maintained, and is showing an incumbrance on real estate, such an inquiry into the title to real estate as to deprive the justice of jurisdiction or defeat the action?

A SUBSCRIBER.

32. On the trial of Hilands for murder, the jury were permitted to separate after being sworn, but before any evidence was given. The next morning, the court expressed doubts as to the legality of the separation, and discharging the jury, ordered the impaneling of another. The defendant was tried and convicted, after a plea of former jeopardy had been entered. On error to the Supreme Court of Pennsylvania, the plea was sustained, and the discharge of the defendant ordered. Since the decision of the Supreme Court, an information, charging the defendant with involuntary manslaughter, has been made. It is claimed that this crime only being a misdemeanor, was not included in the indictment, and that defendant's discharge will not be a bar to the further prosecution. Can this after position be maintained? J. M. H.

[The decision in this case will be found in "Weekly Notes of Cases," of Jan. 7th, (Phila.)].

JNO. M. HULL.

33. In executing a writ of attachment against real estate, the statute requires the officer to leave a copy of the writ, a description of the property, and a notice that it (property described) is attached, with an occupant if there is one. Is a tenant who uses the premises attached, as a place of business, but who does not lodge there, an occupant within the meaning of the statute. Please cite authorities. STUDENT.

34. A. offers for sale to B. a horse for $100, on six month's credit. B. accepts the offer, whereupon A. says: "Then you must give me your note for the amount due in six months." This B. declines to do—wherenpon A. says: "Well, take the horse and you need not give the note,"—whereupon B. says: "Well, I decline to take the horse." Is there any contract by which the parties can be held liable to each other.

Galveston, Tex. JAS. B. STUBBS.

QUERIES ANSWERED.

Query 10.—[21 Cent. L. J. 258.] Can a State constitutionally enact that a creditor shall not, under the penalty of a fine, transfer the claim against a citizen debtor, to be collected by attachment, garnishment, or other process out of the debtor's wages in the courts of other States, when the creditor, debtor, and person owing the money are all within the jurisdiction of the courts of the State enacting the law? Cite authorities bearing on such laws. C.

Answer.—By the U. S. Constitution, Art. 4, § 2, the citizens of each State are entitled to all privileges and immunities of citizens in the several States. This includes "the right to take hold and dispose of property, either real or personal." Corfield v. Coryell, 4 Wash. C. C. 380; McCready v. Virginia, 94 U. S. 391; Conner v. Elliott, 18 How. 591. A State law cannot make it illegal to sell to citizens of other States, and thus prevent them from buying, when it allows its own citizens to buy. The law indirectly takes away the rights of citizens of other States. A party, who owns a claim against another, can go into any court, having jurisdiction, for the assertion of his rights. His agreement in advance not to resort to certain courts, which have jurisdiction of the case, is void as contrary to law. Ins. Co. v. Morse, 20 Wall. 445. S. S. M.

Query 11.—[22 Cent. L. J. 45.] IS A PLATFORM SCALE A FIXTURE?—A. is the owner of forty acres of land used for farming and such stock raising as is generally incident to such a farm in Missouri. On said farm he places a platform scale, attached to the soil by making an excavation and setting posts in the ground, and thus setting the scales—not on a brick or stone foundation. A. then sells the farm to B. by warranty deed. A. afterwards removes the scales, claiming them as personal property? Did the scales constitute a part of the realty and pass to B., the grantee, or were they personal property? Cite authorities.

CONSULTUS.

Answer.—In Dudley v. Foote, S. C. N. H. 1884; 15 Week. Law Bul. 86, it was held that hay scales built upon the land by the owner are real estate and pass with the soil under them, not to the executor, but to the heirs, as a well dug and stoned by testator would have passed to them, and a bill of sale from the heirs of five sixths not under seal, did not convey any interest in the scales, or give a right to any portion of the income derived from them. WM. M. ROCKEL.

Springfield, Ohio.

Query 28.—[21 Cent. L. J. 393]. Apropos the case of People v. Marx, 21 Cent. L. J. 337, I wish to submit the following: During the last two months several fires have occurred in Gallatin, Tenn., which are believed to be the work of incendiaries. In order to protect property more fully, the municipal authorities have enacted the following ordinance: "An Act, entitled an Act to afford additional protection to all property situated within the corporate limits of the town of Gallatin, Tenn. § 1. Be it ordained and enacted by the Mayor and Board of Aldermen of the town of Gallation, that hereafter all the owners of business houses shall be required to suspend business with their customers, and close their houses at ten o'clock P. M., and to keep the same closed and the business aforesaid suspended for the remainder of the night. § 2. Be it further enacted that it shall be unlawful for any person or persons to be upon the streets of Gallatin or in any public place within said town after ten o'clock, P. M., until daylight following, except it be that such person has business or engagements that call him or her upon the streets or in such public places after the hour aforesaid, and any such person found upon or at any such places without a reasonable and genuine excuse, shall be in violation of this section of this act; it being the purpose of this act to prevent persons from strolling about the town who have nothing calling them out after the hour aforesaid. § 3. Be it further enacted that any person violating the provisions of this act except in case of necessity are hereby declared to be guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than $3.00 nor more than $50.00 for each offense, to be paid or secured, as other offenses are now provided for by law. § 4. Be it further enacted that for the better enforcement of the provisions of this act the mayor is hereby

authorized to appoint under the laws now in force, four policemen, whose duty it shall be to keep a vigilant watch, and see that this act is faithfully enforced and observed by all persons, and forthwith to arrest all persons violating the same, and it shall be their duty to enforce all the other laws of the corporation, and to this end they are clothed with like power of the city marshal. These policemen shall be paid the sum of $2.00 each per night for all the services rendered. § 5. Be it further enacted that this act take effect from and after its passage, the public welfare requiring it." The charter contains no special authority on this subject, but Code of Tennessee, § 1607, § 1, provides that all municipal corporations shall have power "To enact such by-laws and ordinances as may be necessary and proper to preserve the health, quiet, and good order of the town." W. B. S.

Answer.—Personal liberty, which is one of our most valued rights, includes the right to move one's person to whatsoever place one's own inclination may direct. 1 Bl. Com. 134. The police power, whether exercised by legislative act or by city ordinance, has never been accurately defined, but one of the limitations on it is well expressed in the following words: "It is not within the power of the general assembly, under the pretense of exercising the police power of the State, to enact laws not necessary to the preservation of the health and safety of the community, that will be oppressive and burdensome upon the citizen." Toledo etc. R. R. v. Jacksonville, 67 Ill. 37. The courts will protect against such acts. *In re* Jacobs, 98 N. Y. 110; Lake View v. Rose Hill Cem., 70 Ill. 194; Mayor v. Winfield, 8 Humph. 707; Grills v. Mayor, 8 Bax. 247; *Ex parte* Frank, 52 Cal. 606. This ordinance is oppressive and not necessary, and therefore void.

S. S. M.

RECENT PUBLICATIONS.

THE AMERICAN DECISIONS, containing the cases of general value and authority decided in the courts of the several States from the earliest issue of the State Reports to the year 1869. Compiled and annotated by A. C. Freeman, counsellor at law, and author of "Treatise on the Law of Judgments," "Co-Tenancy and Partition," "Execution in Civil Cases," etc. Vols. 68, 69, 70 and 71. San Francisco: A. L. Bancroft & Co. 1885, 1886.

These volumes, uniform with their numerous predecessors, are in all respects equal to them, or, more probably, surpass them, in interest and usefulness. The series is now gradually coming down to its prescribed limit (1869), and of course the cases included in the later, are of more general value and higher authority than those in the earlier volumes. These include "the cases of general value and authority" decided in the several States during the years 1856, 1857 and 1858, and it is safe to assume from the well-established reputation of the compiler that they include all the cases of "value and authority," decided by the several Supreme Courts during the period which they cover.

The series is well worthy of a place in the library of any practitioner.

MISSOURI REPORTS. Reports of cases argued and determined in the Supreme Court of the State of Missouri. F. M. Brown, State Reporter. Vol. 83. Columbia, Mo.: E. W. Stephens, Publisher. 1886.

MISSOURI APPEAL REPORTS. Cases determined in the St. Louis and Kansas Courts of Appeals of the State of Missouri from March 17. 1885, to May 19 1885, reported by A. Moore Berry, of the St. Louis Bar, and James F. Mister, of the Kansas City Bar, official reporters. Vol. XVII. Columbia, Mo.: E. W. Stephens, Publisher. 1886.

These two volumes may well be considered together. The reporters have evidently done their whole duty in the arrangement of the cases, in the headlines and in the index. There is a suggestion, however, which we venture to make to the reporters of the second of these volumes for their consideration, with reference to their next issue. It would be well that the head line of the pages should distinguish between the two courts; so that upon opening the book the reader would see at the first glance by which court the case was decided. It is not very important, of course, but might be a convenience. The volumes are well gotten up and are very creditable to the publisher. These volumes are sold at $1.36 each, which is decidedly cheap.

JETSAM AND FLOTSAM.

UNIQUE VERDICT OF CORONER'S JURY.—"State of Arkansas, County of ——, Township of ——, an inquisition taken this 4th day of February, 1886, —— J. P. for the county aforesaid upon the view of the Dead Boddie of ——, who is about 5 ft. 6 1-2 high, weigh about 130 pounds, dark complected, find that he came to his death by —— Special Deputy Constable, the said —— attemted to kill the said —— who after a tussle, managed to shoot him with a shot gun, which shot taken affect in the stomach & killed him the said ——, who was proved to be a desperate character from the evidence & according to Law we the undersigned Justice & Jurors find that —— did the killing in *extreme justifiable homicide* and that he done it to save his own life—$2.15 was found on his person which was used to pay for a coffin and a bottle of whiskey."

There is a painful ambiguity in the last sentence of this verdict. Was the $2.15 used to pay for the coffin, and for a bottle of whisky? Or was the bottle of whisky, as well as the money, found upon the person of the deceased! As there is no probability that the verdict will be amended, there is scope for conjecture. As the deceased was found to be a "desperate character," and came to his end after a "tussle," the presumption would be that any bottle found on his person would be a whisky bottle, empty, not a bottle of whisky. We are therefore led to the conclusion that the bottle of whisky was bought with the money—to console the survivors.

THE WAY TO SHORTEN ARGUMENT—"In general, if we are not mistaken, alert attention is the best way for a court to shorten argument, and the tendency of interruptions to engender desultory and rambling dialogues in disregard of the rules as to the opening and closing is a fertile source of prolonged and fruitless discussion. But counsel having sufficient self possession will rarely find occasion to regret an interruption, which enables him to address himself more immediately to the hinge of the controversy as it rests in the Judge's mind, or to supply needed elements in the discussion or correct misapprehension. There are, doubtless, however, counsel whose talking apparatus is in such good running order and whose supply of volatile ideas ready to expand indefinitely, when the presence of enforced silence is taken off, is so inexhaustible that interruption is the only relief, both for the bench, the adversary and the waiting calendar.—Exchange.